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# STATE TREASON: THE HISTORY AND VALIDITY OF TREASON AGAINST INDIVIDUAL STATES

*J. Taylor McConkie*<sup>1</sup>

## INTRODUCTION

Many lawyers will be surprised to learn that forty-three states currently have constitutional provisions or criminal statutes that define treason against the state. The United States, as sovereign, can unquestionably criminalize treason, but do *individual states*—themselves sovereigns within the powers not ceded to the federal government—have the power to define and punish treason? This simple question once grabbed the attention of the best legal minds. It was among the burning questions that divided the delegates to the Constitutional Convention and later featured prominently in leading criminal law treatises. But scholars have not seriously questioned the validity of state treason laws in over a century. Although some scholars recognize the significance of the issue,<sup>2</sup> no one has yet catalogued the seminal authorities or analyzed the issue in light of the modern legal landscape. This article, by revisiting an old but unresolved debate, seeks to do just that.

Treason is the highest crime known to law.<sup>3</sup> It is more serious than even murder: the murderer violates a single person or at most only a few, whereas treason cuts at the welfare and safety of all members of society.<sup>4</sup> And the punishment for treason has always underscored the gravity of the offense.

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1 Brigham Young University, B.A.; Georgetown University Law Center, J.D. Trial Attorney, United States Department of Justice, Civil Division. The views expressed in this article are solely my own, and nothing in this article should be interpreted as reflecting the views or positions of my current employer. I heartily thank Levi Smylie, David McConkie, Rodney Morris, and my wife, Wendy, for their review of prior drafts of this article. I also thank the law librarians at Georgetown University for their assistance in locating difficult-to-find sources.

2 See, e.g., Carlton F. W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 886 (2006) (“Whether treason against an individual state was or is a viable crime is a fascinating question, but one that lies beyond the scope of this Article.”).

3 See, e.g., *Hanauer v. Doane*, 79 U.S. 342, 347 (1870) (“No crime is greater than treason.”).

4 E.g., *In re Charge to Grand Jury*, 30 F. Cas. 1036, 1038 (C.C.S.D. Ohio 1861) (No. 18,272) (“Treason is justly considered the highest crime against society. Having for its object an assault by violence on the government, and thus to effect is overthrow, it may imperil the happiness and lives of millions.”).

At common law, traitors were publicly dragged to the place of execution and there hanged, quartered, and beheaded.<sup>5</sup> Women had it slightly better: they were merely hanged and burned.<sup>6</sup> Whereas the penalty for murder was death, for treason, it was death with vengeance. Today, of course, we no longer quarter and behead criminals, but treason still sits atop the criminal pyramid and imposes a stigma unmatched by other crimes. And yet, at the state level, treason is largely a symbolic crime. Since the ratification of the Constitution, state courts have completed only two treason prosecutions, both of which occurred over 150 years ago.<sup>7</sup>

This article has two objectives. The first, largely descriptive, is to provide an overview of state treason laws from colonial times to today. The second is to wade into the debate over whether states can define and punish treason and ultimately reach conclusions that will hopefully encourage states to take a fresh look at their treason laws.

To achieve these objectives, this article is divided into the following sections. Section I sets the stage by outlining the historical roots of American treason law, including its origins in the English common law, its importation to America during colonial times, and the debate during the Constitutional Convention over whether the states would retain the ability to define treason under the federal Constitution. Section II discusses the development of state treason laws since ratification of the Constitution, including a snapshot of state practice during the early years of the Republic as well as an overview of current laws. This overview yields some surprising conclusions, including that nearly half of the states that define treason do so by constitutional provisions that are not self-executing, and therefore those provisions are likely non-justiciable and unenforceable. Section III then turns to the historical debate over the validity of state treason laws. I discuss the key judicial opinions and trace the debate through criminal law treatises and state legislative histories, showing that, although the issue once ignited strong opinions, it has largely vanished from modern legal discourse.

In section IV, I offer my own analysis of whether states can define and punish treason. The validity of the crime ultimately hinges on the meaning of sovereignty in our federalist system of government. I conclude that, in light of the historical record from the Constitutional Convention and considering the nature of dual sovereignty and federal criminal jurisdiction, states have the power to protect against subversive activities through treason laws. The content of the crime, however, is not unbounded and states should take into account their station in the federal system. States should not, for example, define treason to include "adhering to the enemies of

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5 ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 103 (1930).

6 *Id.*

7 See *infra* note 122 and accompanying text.

the state” for the simple reason that states lack the power to wage war and engage in foreign diplomacy, the necessary prerequisites to creating “enemies” under longstanding treason case law. Finally, my conclusion includes recommendations on how policy makers might update state treason laws to better reflect contemporary realities, both legal and practical.

## I. THE LAW OF TREASON IN AMERICA

### A. *English Roots*

The study of treason is really the study of history. No other constitutional provision is as deeply rooted in English history as the Treason Clause.<sup>8</sup> William Blackstone wrote that treason “imports a betraying, treachery, or breach of faith.”<sup>9</sup> Blackstone further noted that treason against the sovereign—termed “high treason”—amounts to the “highest civil crime.”<sup>10</sup> Due to the gravity of the offense, the crime of treason must therefore be precisely ascertained. “For if the crime of high treason be indeterminate, this alone . . . is sufficient to make the Government degenerate into arbitrary power.”<sup>11</sup>

English history prior to Blackstone demonstrated that a loosely defined treason law led to arbitrary and oppressive power. Blackstone attributed the oppressive application of treason laws to common law judges who used their leeway in applying the law in order to please the Crown. This resulted in a bevy of “constructive treasons” that left English subjects confused and uncertain about to how to act.<sup>12</sup> Illustrating the problem, Blackstone pointed to the “very uncertain charge” during the reign of Edward III (1312–1377) of “*accroaching*, or attempting to exercise, royal power.”<sup>13</sup> This vague charge was held to be treason in the case of a knight who forcibly assaulted and detained one of the King’s subjects until he paid a ransom:<sup>14</sup> “[a] crime,

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8 U.S. CONST. art. III, § 3.

9 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 74–75 (Philadelphia, Evert Duyckinck, George Long, Collins & Co., Collins & Hannay, and Abraham Small, Last London ed. 1822).

10 *Id.*

11 *Id.* at 75.

12 *Id.* (“[B]y ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such.”).

13 *Id.* at 75–76.

14 *Id.* at 76.

it must be owned, well deserving of punishment: but which seems to be of a complexion very different from that of treason."<sup>15</sup>

In an effort to eliminate constructive treasons that had resulted in many injustices, Parliament passed the Statute of 25 Edward III, or the Treason Act of 1351. This statute revolutionized the law of treason by attempting to provide a precise definition. Under the statute, treason fell into one of seven distinct branches, and if the challenged conduct did not meet one of the seven branches, it was not treason.<sup>16</sup> Blackstone lauded the statute, writing: "Thus careful was the legislature, in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason, that had formerly prevailed in our courts."<sup>17</sup> Looking back on this history, Thomas Jefferson appraised the statute more bluntly. In Jefferson's view, Statute of 25 Edward III was "done to take out of the hands of tyrannical Kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn the blood of the best and honestest men in the kingdom."<sup>18</sup>

### B. *Treason Laws Prior to Ratification of the Constitution*

In colonial America, there were scattered treason prosecutions prior to the Revolution, although remaining records are scant.<sup>19</sup> As might be ex-

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<sup>15</sup> *Id.*

<sup>16</sup> These seven branches include: 1st: "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir." *Id.* 2nd: It is treason "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." *Id.* at 80. 3rd: It is treason to "levy war against our lord the king in his realm." *Id.* at 81. 4th: To be "adherent to the king's enemies" or to give them "aid and comfort in the realm." *Id.* at 82. 5th: It is treason to "counterfeit the king's great or privy seal." *Id.* 6th: It is treason to "counterfeit the king's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandise and make payment withal." *Id.* at 83. 7th: It is treason to "slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." *Id.*

<sup>17</sup> *Id.* at 84.

<sup>18</sup> 1 THE WRITINGS OF THOMAS JEFFERSON 215 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Monticello ed. 1904), quoted in *Cramer v. United States*, 325 U.S. 1, 21 n.28 (1945).

<sup>19</sup> Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 245-46 (1944) (hereinafter *Treason I*). In preparation for its hearing of *Cramer v. United States*, 325 U.S. 1 (1945), the United States Department of Justice requested Professor Hurst to conduct a historical analysis of treason in America. He published his research in the *Harvard Law Review* in three installments. The first, which I will refer to as *Treason I*, dealt with treason prior to the Constitution. The second installment, Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945) (hereinafter *Treason II*), dealt with the history and policy of the Treason Clause. The third installment, Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 806 (1945) (hereinafter *Treason III*), dealt with the doctrinal development of treason after the adoption of the Constitution. Professor Hurst later collected these materials into a book. JAMES WILLARD

pected, the English subjects who had transplanted to America drew extensively on English law, especially the Statute of 25 Edward III. “Taking the colonial period as a whole,” writes Professor James Willard Hurst, “in most of the colonies the definition of the offense was clearly thought of in terms of the English legislation stemming from the Statute of 25 Edward III.”<sup>20</sup> Prior to the Revolution, most of the colonies adopted some form of statute addressing treason.<sup>21</sup> Some of the statutes substantially adopted the language of the Statute of 25 Edward III, while others simply declared that the colony would adhere to English law.<sup>22</sup>

Although English history demonstrated that broad treason laws led to abuse, the colonists did not fully internalize this lesson. In adapting English authorities to their local circumstances, the colonists in some instances greatly expanded the definition of treason. By the Act of May 6, 1691, for example, the New York legislature declared it treason “by force or arms or otherwise to disturb the peace good and quiet” of the Majesty’s government.<sup>23</sup> Looking at the whole of colonial history, the law of treason consistently emphasized the safety of the state over individual liberties, an unsurprising fact in light of the colonies’ circumstances. The colonists were, after all, separated from their homeland by a massive ocean and surrounded by hostile foreign powers that posed threats to their security.<sup>24</sup> The legal histories of many nations illustrate that treason laws are applied most broadly and forcefully during times of internal insecurity, and colonial America was no exception.

After the successful Revolution, the delegates to the Continental Congress (who had, of course, themselves engaged in massive acts of treason against England) adopted a resolution on June 24, 1776 declaring the need for allegiance, outlining the contours of a treason law, and recommending that the individual colonies enact treason laws as they saw fit:

*Resolved*, . . . That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the

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HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (Stanley I. Kutler ed., Greenwood Publ’g Corp. 1971). Professor Hurst remains the seminal authority on American treason law. For another effective summary of American treason law, see BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON* (Univ. of Washington Press 1964).

<sup>20</sup> *Treason I*, *supra* note 19, at 226.

<sup>21</sup> *See id.* at 232.

<sup>22</sup> *Id.* at 229.

<sup>23</sup> *Id.* at 233.

<sup>24</sup> *Id.* at 235–36 (“Relatively weak and remote settlements, necessarily alert to the nearness of hostile empires and Indian tribes, would naturally think first in terms of positive defense against external enemies.”).

said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described.<sup>25</sup>

All of the colonies except Georgia followed the Continental Congress's advice and enacted treason statutes, although not all followed the recommended pattern.<sup>26</sup> The pattern provided by the Continental Congress is significant. The language harkens back to the Statute of 25 Edward III, but restricts the definition of treason to just two of the seven branches—namely, (1) levying war against any of the colonies, and (2) adhering to the enemies of the colonies, giving them aid and comfort. In seeking to restrict the content of the crime, the drafters of the resolution evidenced an awareness that existing treason laws in the colonies had expanded dangerously beyond recognition.<sup>27</sup>

But treason legislation continued to grow and broaden over time.<sup>28</sup> In the later years of the Continental Congress, some legislation became so broad that the mere utterance of an unfavorable political opinion could be treason. The New York Act of March 30, 1781 made it a felony to declare or maintain “by preaching, teaching, speaking, writing, or printing . . . that the King of Great Britain hath, or of Right ought to have, any Authority, or Dominion, in or over this State, or the Inhabitants thereof . . .”<sup>29</sup> Broadening of the law was, again, the product of insecure surroundings. Although the military conflict with England had ended, Canada was inhabited largely

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25 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–89, *edited from* THE ORIGINAL RECORDS IN THE LIBRARY OF CONGRESS BY WORTHINGTON CHAUNCEY FORD 475 (Washington Gov't Printing Office 1906).

26 *Treason I*, *supra* note 19, at 248, n.35. Nine colonies enacted statutes substantially following the Resolution of June 24, 1776 (Del., Mass., N.H., N.J., N.Y., N.C., Pa., R.I., and Va.). Three colonies charted their own course and enacted treason statutes that did not follow the language of the Resolution (Conn., Md., and S.C.). Georgia did not enact a treason statute.

27 The committee responsible for drafting the language included John Adams, Thomas Jefferson, John Rutledge, James Wilson, and Robert Livingston. *Treason I*, *supra* note 19, at 247. Lawyers of this caliber would have been well acquainted with English precedents and the dangers of broad treason laws.

28 *Treason I*, *supra* note 19, at 250–72; *see also* United States v. Cramer, 325 U.S. 1, 10–11, n.13 (1945).

29 *Treason I*, *supra* note 19, at 266. Virginia enacted a similar law that imposed hefty fines on any person who “by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain . . .” *Id.* at 267.

by the English, and English sympathizers remained scattered throughout the colonies. French and Spanish forces dominated to the west and south.<sup>30</sup> During the years under the Continental Congress, although legislators recognized that broad and indeterminate treason laws tended to injure individual liberty, the security of the embryonic colonies took precedence.<sup>31</sup>

### C. *The Constitutional Convention Debates and Formation of the Treason Clause*

The delegates to the Constitutional Convention faced a significant dilemma when they met to frame a new system of government. On one hand, the new republic would not last if the government could not demand the loyalty of its citizens;<sup>32</sup> on the other hand, history had shown that broad treason laws led to the suppression of political opposition and free speech.<sup>33</sup> English experience had also shown that leaving the definition of treason to judges left the law open to abuse through “constructive treasons.”<sup>34</sup> The Framers therefore took upon themselves the difficult task of fashioning a law that would protect the newly formed government from disloyalty and betrayal, while simultaneously preserving the right of political dissent.

Charles Pinckney took the first step. On May 29, 1787, he submitted a plan proposing changes to the existing Articles of Confederation.<sup>35</sup> The Pinckney Plan provided that Congress “shall have the exclusive Power of declaring what shall be Treason & Misp. of Treason agt. U.S.”<sup>36</sup> Possibly using the Pinckney plan as a springboard, on August 6, 1787, the Committee on Detail reported a draft constitution that contained the first draft of the Treason Clause.<sup>37</sup> The Committee’s draft stated as follows:

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30 Justice Jackson’s opinion in *Cramer*, 325 U.S. at 8, highlights this history:

[People during the founding generation] were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been. England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France had but lately been dispossessed in the Ohio Valley; Spain claimed the Mississippi Valley; and except for the seaboard, the settlements were surrounded by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes.

31 Summarizing the period between the Revolution and ratification of the Constitution, Professor Hurst concludes: “Thus the period of the Revolution introduces cautionary notes regarding the scope of ‘treason’ such as were not seen in the colonial era; but the evidences of the new trend are only suggestive and wavering in their implications. The burden of the story remains the security of the state.” *Treason I*, *supra* note 19, at 256.

32 See *Treason I*, *supra* note 19, at 257–58.

33 *Treason I*, *supra* note 19, at 250–72; see also *Cramer*, 325 U.S. at 10–12, n.13.

34 4 BLACKSTONE *supra* note 9, at 75–76.

35 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 16 (Max Farrand, ed. 1911).

36 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 136 (Max Farrand, ed. 1911). The reference to “Misp. of Treason” refers to misprision of treason, a crime committed by one who has knowledge of treasonous acts but fails to report to it to the proper authority.

37 *Id.* at 182.



Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of bloods nor forfeiture, except during the life of the person attainted.<sup>38</sup>

This draft is significant because treason against a state is made treason against the entire Union, effectively erasing a state's ability to define and punish the crime. Under the draft, treason against the United States consists of levying war against the United States, "*or any of them,*" and of adhering to the enemies of the United States, "*or any of them.*"<sup>39</sup>

The delegates debated this draft on August 20, 1787.<sup>40</sup> The debate covered several issues relating to the substantive elements of the crime, and in every instance, the outcome was to restrict the offense.<sup>41</sup> In so doing, the delegates guarded against the dangers inherent in the broad treason laws of past generations.<sup>42</sup> In later years, the Framers viewed the Treason Clause with great pride, interpreting its inclusion in the Constitution as an important victory for individual liberty. James Wilson, for instance, boasted that a "single sentence comprehends our whole of national treason," a sentence that resulted from "mature experience, and ascertained by the legal

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 340-41.

<sup>41</sup> For instance, Madison (somewhat uncharacteristically) opened the debate by unsuccessfully arguing that the draft was too narrow and ought to be broadened to align more with the Statute of 25 Edward III. *See* 2 FARRAND, *supra* note 36, at 345. Another topic of debate included the phrase "adhering to the enemies of the United States"; George Mason moved to insert "'giving <them> aid comfort'[]" as restrictive of 'adhering to their Enemies &c'—the latter he thought would be otherwise too indefinite," and the motion prevailed. *Id.* at 349. On the evidentiary requirement of two witnesses, the delegates agreed to insert after "two witnesses" the words "to the same overt act." *Id.* at 348. Benjamin Franklin supported the amendment because "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." *Id.*

<sup>42</sup> For example, in Federalist No. 43, writing in defense of the Treason Clause, Madison noted that:

[A]s new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

THE FEDERALIST NO. 43, at 310 (James Madison) (Benjamin Fletcher Wright ed., 1961).

interpretation, of numerous revolving centuries.”<sup>43</sup> Alexander Hamilton, in answering the criticism that the early Constitution lacked a Bill of Rights, listed the Treason Clause among the constitutional provisions protecting individual liberty.<sup>44</sup>

Most of the debate at the Constitutional Convention focused on how the crime should fit into the federal system. Numerous delegates favored denying states the ability to enact treason laws, grounding their arguments in federal sovereignty and national cohesion. Gouverneur Morris, for instance, “was for giving to the Union an exclusive right to declare what shd. be treason.”<sup>45</sup> He reasoned that “[i]n case of a contest between U–S– and a particular State, the people of the latter must, under the disjunctive terms of the clause, be traitors to <one> or other authority.”<sup>46</sup> William Samuel Johnson “contended that Treason could not be both agst. the U. States – and individual States; being an offence agst the Sovereignty which can be but one in the same community.”<sup>47</sup> He similarly asserted that “there could be no Treason agst a particular State. It could not even at present, as the Confederation now stands; the Sovereignty being in the Union; much less can it be under the proposed System.”<sup>48</sup> Rufus King held essentially the same view, stating that “no line can be drawn between levying war and adhering to [the] enemy – agst the U. States and agst an individual States – Treason agst the latter must be so agst the former.”<sup>49</sup> John Dickenson similarly opined that “war or insurrection agst a member of the Union must be so agst the whole body; but the Constitution should be made clear on this point.”<sup>50</sup>

Those on the other side articulated a stronger view of state power and drew finer distinctions in federal and state sovereignty. In response to Johnson’s statements, George Mason stated that “the United States will have a qualified sovereignty only. The individual States will retain a part of the Sovereignty. An act may be treason agst a particular State which is not so against the U. States.”<sup>51</sup> Mason bolstered his position with reference to

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43 3 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 99–100 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804).

44 THE FEDERALIST NO. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

45 2 FARRAND, *supra* note 36, at 345.

46 *Id.*

47 *Id.* at 346.

48 *Id.* at 347. Johnson’s view that there could be no state treason even under the Articles of Confederation is somewhat perplexing. As we have seen, the Continental Congress recommended that the states enact treason laws, and nearly all of them did so. *See supra* note 26 and accompanying text.

49 2 FARRAND, *supra* note 36, at 349.

50 *Id.*

51 *Id.* at 347.

Bacon's Rebellion, an example where violence against the ruling authority was directed at state officials due to state policies.<sup>52</sup> James Wilson stated that, in most cases, treason would be an offense against the entire United States, "yet in many cases it may be otherwise."<sup>53</sup> Oliver Ellsworth stated that "the U.S. are sovereign on one side of the line dividing the jurisdictions – the States on the other – each ought to have power to defend their respective Sovereignities."<sup>54</sup> For his part, Roger Sherman suggested a practical way to divide the crime among dual sovereignties: "resistance agst the laws of the U– States as distinguished from resistance agst the laws of a particular State, forms the line."<sup>55</sup>

The issue came to resolution as the delegates considered several amendments to the original draft. Although the delegates debated numerous amendments, action on three proposals primarily shaped the outcome. First, a majority of delegates agreed to strike "or any of them" after "United States."<sup>56</sup> Second, on a 6–5 vote, they rejected a proposal that the United States should have the "sole" power to declare the punishment for treason.<sup>57</sup> And third, on another 6–5 vote, a majority voted to keep the language "against the United States" after "treason."<sup>58</sup> Had modern word-processing been available, the delegates could have produced a simple red-line showing how the final version had evolved out of the Committee on Detail's initial draft:

~~Treason against the United States, shall consist only in levying War against the United States them, or any of them; and in adhering to the enemies of the United States, or any of them their Enemies, giving them Aid and Comfort. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. No attainder of treason shall work corruption of bloods, nor forfeiture, except during the life of the person attainted.~~

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

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<sup>52</sup> *Id.* Bacon's Rebellion is considered the first rebellion in the American colonies. In 1676, about 1,000 armed Virginians rose up against the governor of the state because they were upset that the governor failed to retaliate for a series of attacks on the colonists by Native Americans.

<sup>53</sup> *Id.* at 348. Wilson also acknowledged the difficulty of the issue, adding that "the subject . . . was intricate and he distrusted his present judgment on it." *Id.*

<sup>54</sup> 2 FARRAND, *supra* note 36, at 349.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 346.

<sup>57</sup> *Id.* at 348.

<sup>58</sup> *Id.* at 349.

The end result was a victory for the delegates in favor of state treason laws. In rejecting the proposal to give the United States the “sole” power to punish treason and in defining treason as “against the United States,” the states retained the ability to define treason according to their own standards, a concept that was later reinforced by the language of the Tenth Amendment.<sup>59</sup>

Throughout the debate, Madison repeatedly expressed concern that if the United States and individual states shared a concurrent power to define treason, the same criminal act could result in prosecution by both sovereigns.<sup>60</sup> The final language of the Treason Clause did nothing to allay his concern. At the conclusion of the debate, Madison noted that he was “not satisfied with the footing on which the clause now stood. As treason agst the U—States involves Treason agst particular States, and vice versa, the same act may be twice tried & punished by the different authorities—.”<sup>61</sup> But Madison’s dissatisfaction notwithstanding, a majority of delegates decided to live with the possibility of multiple prosecutions for the same criminal act if it meant the states retained the power to define and punish treason.

## II. STATE TREASON SINCE THE CONSTITUTION

### A. *Overview of State Practice Following Ratification of the Constitution*

As we have seen, while operating under the Articles of Confederation, each of the thirteen states except Georgia enacted legislation defining treason.<sup>62</sup> Following ratification of the Constitution, the states moved in different ways and at different speeds in defining treason.

The original thirteen states did not act immediately to address treason. By 1800, only five of the thirteen states had enacted new laws defining

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59 The Tenth Amendment, ratified on December 15, 1791, states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. This amendment merely distilled the structural logic of the Constitution that a state, when authorized by its own laws, can enact any law not inconsistent with the Constitution.

60 For example, Madison said he was not satisfied with the Committee on Detail’s original draft because “it would seem that the individual States wd. be left in possession of a concurrent power so far as to define & punish treason particularly agst. themselves; which might involve double punishment.” 2 FARRAND, *supra* note 36, at 346.

61 *Id.* at 349.

62 See *supra* note 26 and accompanying text.

treason: New Hampshire,<sup>63</sup> Delaware,<sup>64</sup> Virginia,<sup>65</sup> New Jersey,<sup>66</sup> and Massachusetts.<sup>67</sup> By 1820, four more had enacted new laws defining treason: New York,<sup>68</sup> South Carolina,<sup>69</sup> Georgia,<sup>70</sup> and Connecticut.<sup>71</sup> The remaining four states—Rhode Island,<sup>72</sup> Pennsylvania,<sup>73</sup> North Carolina,<sup>74</sup> and Maryland<sup>75</sup>—acted between 1838 and 1862. The fact that the original thirteen states waited years or even decades after ratification of the Constitution to update their definition of treason shows that the states were content to rely on statutes or common law that existed prior to the creation of the new Union.<sup>76</sup>

Of the remaining thirty-seven states that joined the Union after ratification of the Constitution, thirty-two states included provisions defining

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63 Act of Feb. 8, 1791, 1792 N.H. Laws 243.

64 DEL. CONST. of 1792, art. V, § 4.

65 Va. Act of Dec. 26, 1792, Ch. CXXXVI, *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 282 (Richmond, Augustine Davis, 1794).

66 Act of March 18, 1796, Ch. DC, § 1, 1795 N.J. Laws 92 (1796).

67 An Act against Treason and Misprision of Treason, and for regulating Trials in such Cases, Ch. LXXI, § 2 (originally passed in 1777 and recodified in 1799), *reprinted in* 3 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASS. app. at 121 (Boston, I. Thomas & E. T. Andrews, 1801).

68 Act of Mar. 20, 1801, ch. 29, 1801 N.Y. Laws 45.

69 Act of Dec. 19, 1805, tit. 153, § 4, *reprinted in* 2 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA 202 (Joseph Brevard ed., 1814).

70 Ga. Penal Code, 4th Div., §§ 2-3 (1816), *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE SINCE THE YEAR 1810 TO THE YEAR 1819, INCLUSIVE 567 (Lucius Q. C. Lamar ed., 1821).

71 CONN. CONST. of 1818, art. IX, § 4.

72 Act of Jan. 1838, ch. 1, § 1, 1838 R.I. Pub. Laws 3.

73 Act of Mar. 31, 1860, tit. I, § 1, 1860 Pa. Laws 385.

74 Act of May 11, 1861, ch. 59, § 1, 1859 N.C. Sess. Laws 144.

75 Act of Mar. 6, 1862, ch. 235, sec. 202, § 202, 1861 Md. Laws 250.

76 Pennsylvania and Maryland illustrate this point. In 1794, the Pennsylvania legislature enacted a statute establishing new penalties for treason committed under the pre-ratification statutes. 5 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 2 (M. Carey and J. Bioren eds., 1803). After ratification of the Constitution, the Pennsylvania legislature did not enact a new statute defining treason until 1860. Act of Mar. 31, 1860, tit. I, § 1, 1860 Pa. Laws 385. Similarly, Maryland first defined treason in 1777. Act of Feb. 1777, ch. XX, 1777 Md. Laws xix. In 1810, Maryland updated the penalty for the crime of "high treason against the state," but did not define the crime, leaving the prior definition from 1777 untouched. *See* Act of Jan. 6, 1810, ch. CXXXVIII, 1809 Md. Laws lxxxviii (1810). Maryland did not update its definition of treason until 1862. *See* Act of Mar. 6, 1862, ch. 235, sec. 202, § 202, 1861 Md. Laws 250 (1862). Regarding the common-law nature of state treason, Francis Wharton noted in 1861 that "[t]reason is undoubtedly a common law offence in each state, aside from constitutional and statutory provisions, and is recognized as having a substantive and independent existence. . . ." 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 2766 (5th ed. 1861) (citation omitted).

treason in their first constitutions.<sup>77</sup> The five that did not were Vermont, Tennessee, Ohio, Illinois, and Hawaii. Each of these states except Hawaii enacted a criminal statute defining treason after reaching statehood.<sup>78</sup> Hawaii is the only state that has never had a constitutional provision or statute on treason since joining the United States.<sup>79</sup>

Examining the substance of each state's early treason laws would require more space than is available here. We can, however, note a few general features that characterize the states' early definitions of the crime. Most states followed the federal pattern by defining the crime in the state constitution itself. Thirty-four of the fifty states inserted constitutional provisions that copied the definition of treason from the Treason Clause almost verbatim, merely substituting the name of the state for "the United States."<sup>80</sup> Fifteen states opted to define treason through a criminal statute instead.<sup>81</sup> These statutes included the same two branches of treason out-

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77 ALA. CONST. of 1819, art. VI, § 2; ALASKA CONST. art. I, § 1.10 (enacted in 1956); ARIZ. CONST. art. II, § 28 (enacted in 1912); ARK. CONST. of 1836, art. VII, § 2; CAL. CONST. of 1849, art. I, § 20; COLO. CONST. art. II, § 9 (enacted in 1876); FLA. CONST. of 1838, art. XVI, § 4; IDAHO CONST. art. V, § 5 (enacted in 1889); IND. CONST. of 1816, art. XI, §§ 2–3; IOWA CONST. of 1846, art. II, § 16; KAN. CONST. Bill of Rights, § 13 (enacted in 1859); KY. CONST. of 1792, art. VIII, § 1; LA. CONST. of 1812, art. VI, § 2; ME. CONST., art. I, § 12 (enacted in 1820); MICH. CONST. of 1835, art. I, § 16; MINN. CONST. art. I, § 9 (enacted in 1858); MISS. CONST. of 1817, art. III, § 10; MO. CONST. of 1820, art. XIII, § 15; MONT. CONST. of 1889, art. III, § 9; NEB. CONST. of 1866, art. I, § 10; NEV. CONST. art. I, § 19 (enacted in 1864); N.M. CONST. art. II, § 16; N.D. CONST. art. I, § 19 (enacted in 1889); OKLA. CONST. art. II, § 16 (enacted in 1907); OR. CONST. art. I, § 24 (enacted in 1857); S.D. CONST. art. VI, § 25 (enacted in 1889); TEX. CONST. of 1845, art. VII, § 2; UTAH CONST. art. I, § 19 (enacted in 1895); WASH. CONST. art. I, § 27 (enacted in 1889); W. VA. CONST. of 1863, art. II, § 10; WIS. CONST. art. I, § 10 (enacted in 1848); WYO. CONST. art. I, § 26 (enacted in 1889).

78 See Act of Mar. 9, 1797, ch. XXXII, § 1, *reprinted in* 1 LAWS OF THE STATE OF VERMONT 332 (Thomas Tolman ed., 1808); Tenn. Code § 4743 (1858); Act of Jan. 15, 1805, ch. 1, § 1, 1804 Ohio Laws 1 (1805); Act of Mar. 23, 1819, § 1, 1819 Ill. Laws 212.

79 Hawaii had treason laws prior to joining the United States. See, e.g., PENAL CODE OF THE HAWAIIAN ISLANDS, PASSED BY THE HOUSE OF NOBLES AND REPRESENTATIVES 9 (Honolulu, Henry M. Whitney, 1850) (Penal Code, Ch. VI, § 1). In the process of becoming a United States territory, Hawaii repealed all laws that were seen as inconsistent with the United States Constitution, and the treason law was among the criminal statutes repealed. See Act of May 27, 1910, §§ 6–7, 1911 Haw. Sess. Laws 307–09.

80 Of the original thirteen states, the first constitutions of Delaware and Connecticut followed this pattern. DEL. CONST. of 1792, art. V, § 4; CONN. CONST. of 1818, art. IX, § 4, as did the constitutions of each of the thirty-two states identified in *supra* note 77.

81 The 15 states include: Maryland (Act of Mar. 6, 1862, ch. 235, § 202, 1861 Md. Laws 250 (1862)); North Carolina (Act of May 11, 1861, ch. 59, § 1, 1859 N.C. Sess. Laws 144); Pennsylvania (Act of Mar. 31, 1860, tit. I, § 1, 1860 Pa. Laws 385); Tennessee (Tenn. Code § 4743 (1858)); Rhode Island (Act of Jan. 1838, ch. 1, § 1, 1838 R.I. Pub. Laws 3); Illinois (Ill. Act of Mar. 23, 1819, § 1, 1819 Ill. Laws 212); Georgia (Ga. Penal Code, 4th Div., §§ 2–3 (1816), *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE SINCE THE YEAR 1810 TO THE YEAR 1819, INCLUSIVE 567 (Lucius Q. C. Lamar ed., 1821)); South Carolina (Act of Dec. 19, 1805, tit. 153, § 4, *reprinted in* 2 AN ALPHABETICAL DIGEST OF

lined in the Treason Clause: (1) "levying war" against the state, and (2) "adhering to the state's enemies, giving them aid and comfort."<sup>82</sup> Thus, left with the power to define treason according to their own preferences, states generally followed the same policy of the Treason Clause by restricting the content of the crime.

There were, however, some deviations from the restrictive policy. Perhaps the most dramatic example is South Carolina's 1805 statute that made it treason to connect oneself, directly or indirectly, "with any slave or slaves in a state of actual insurrection within this state" or to "excite, counsel, advise, induce, aid, comfort or assist any slave or slaves to raise or attempt to raise an insurrection within this state."<sup>83</sup> Merely affording shelter or protection to slaves assembling for any purpose "tending to treason or insurrection" violated the statute and was punishable by death.<sup>84</sup>

Other states broke from the restrictive policy by expanding the definition of treason to include acts aimed at the United States. New Jersey, for example, made it treason to "adhere to [the State's] enemies, or the enemies of the United States, giving them aid or comfort within this state or elsewhere . . . ."<sup>85</sup> Illinois similarly made it treason to "levy war *against the United States* or against this state" or to "assist any enemies at war *against the United States* or this state."<sup>86</sup> Apparently it did not occur to these states that, because the Treason Clause exclusively defines treason against the United States, state laws attempting to cover the same terrain were invalid.<sup>87</sup> Perhaps this is the

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THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA 202 (Joseph Brevard ed., 1814)); Ohio (Act of Jan. 15, 1805, ch. 1, § 1, 1804 Ohio Laws 1 (1805)); New York (Act of Mar. 20, 1801, ch. 29, 1801 N.Y. Laws 45); Vermont (Act of Mar. 9, 1797, ch. XXXII, § 1, *reprinted in* 1 LAWS OF THE STATE OF VERMONT 332 (Thomas Tolman ed., 1808)); New Jersey (Act of Mar. 18, 1796, ch. DC, § 1, 1795 N.J. Laws 92 (1796)); Virginia (Act of Dec. 26, 1792, Ch. CXXXVI, *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 282 (1794)); New Hampshire (Act of Feb. 8, 1791, 1792 N.H. Laws 243 (1792)); and Massachusetts (An Act against Treason and Misprison of Treason, and for regulating Trials in such Cases, ch. LXXI, § 2 (1777), *reprinted in* 3 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASS. app. at 121 (Boston, I. Thomas and E.T. Andrews, 1801)).

82 See U.S. CONST., art. III, § 3. South Carolina is the only state whose post-ratification treason law did not include the two branches. See Act of Dec. 19, 1805, tit. 153, § 4, *reprinted in* 2 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA 202 (Joseph Brevard ed., 1814).

83 *Id.*

84 *Id.*

85 Act of Mar. 18, 1796, ch. DC, § 1, 1795 N.J. Laws 92, 92 (emphasis added).

86 Act of Mar. 23, 1819, § 1, 1819 Ill. Laws 212, 212 (emphasis added).

87 The Judiciary Act of 1789 gave federal courts exclusive jurisdiction over federal crimes. See discussion *infra* note 309 and accompanying text. See also *People v. Lynch*, 11 Johns. 549, 553 (N.Y. Sup. Ct. 1814) (holding that "the jurisdiction of the State courts does not extend to the offense of treason against the United States"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1296, at 173 (Boston, Hilliard, Gray and Co. 1833) ("The power of punishing the crime of treason against the United States is exclusive

reason that Tennessee amended its treason statute in 1861 by striking all references to treason against the United States.<sup>88</sup>

New Hampshire and Vermont also broke from the restrictive policy—although more subtly—when they included *conspiracy* to levy war against the state within the definition of treason.<sup>89</sup> By expanding the definition of treason to include conspiracy to levy war, these statutes broadened the category of treasonous conduct and diluted the requirement that the prosecution prove treason by overt acts. Chief Justice Marshall made this point in *Ex parte Bollman*,<sup>90</sup> a federal case involving two civilians who allegedly helped recruit for Aaron Burr’s failed attempt to set up a separate empire in New Orleans, with himself as ruler.<sup>91</sup> “However flagitious may be the crime of conspiring to subvert by force the government of our country, *such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences.*”<sup>92</sup> To constitute a levying of war, wrote Marshall, “there must be an actual assembling of men for the treasonable purpose.”<sup>93</sup> The Court held that merely conspiring to levy war by helping with recruitment did not satisfy the “levying war” prong:

In the case now before the court, a design to overturn the government of the United States in New-Orleans by-force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; *but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.*<sup>94</sup>

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in congress; and the trial of the offence belongs exclusively to the tribunals appointed by them.”). Illinois and New Jersey, it should be noted, eventually dropped the troublesome “of the United States” and “against the United States” language from their treason laws. The current treason law of those states omits that language. *See infra* note 95.

88 Act of May 3, 1861, ch. 8, § 1, 1861 Tenn. Pub. Acts 36, 36 (the State’s treason statute was “amended that so much of the same as speaks of the United States, and defines offences against the United States as treason, is hereby repealed”).

89 Act of Feb. 8, 1791, 1792 N.H. Laws 243, 243 (1792) (stating that it shall be treason to “levy war or conspire to levy war against the same”); 1 LAWS OF THE STATE OF VERMONT, *supra* note 78, at 332 (same).

90 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

91 *Id.* at 126.

92 *Id.* (emphasis added). Modern treason law recognizes the difference between levying war and conspiracy to levy war, with less severe penalties attached to conspiracy. *See* 18 U.S.C. § 2381 (2006) (treason); 18 U.S.C. § 2384 (2006) (seditious conspiracy).

93 *Bollman*, 8 U.S. (4 Cranch) at 126.

94 *Id.* at 127 (emphasis added).



By refusing to allow a conspiracy to levy war, Justice Marshall narrowed the scope of the crime. His reasoning, although applied in the context of a federal case, is equally applicable to state treason laws.

### *B. Overview Of Current State Treason Laws*

Currently forty-three states have laws defining treason against the state.<sup>95</sup> In light of the development of the crime of treason from the English common law, to the Treason Clause, to the early state laws, one would expect current state laws to adhere to a restrictive pattern by incorporating the “levying war” and “adhering to the state’s enemies” branches of treason. And, indeed, the substantive definition of treason in all forty-three states incorporates these two branches of treason.

There are, of course, some differences among the states’ laws. The Georgia Constitution, rather than using the typical “levying war” language, defines treason as “*insurrection against the state*, adhering to the state’s enemies, or giving them aid and comfort.”<sup>96</sup> Indiana’s definition includes “giving aid and comfort to its enemies” but omits the typical “adhering to the state’s enemies” language.<sup>97</sup> A few states add a knowledge element, stating that treason consists of “knowingly” or “intentionally” levying war or adhering to the state’s enemies.<sup>98</sup> And in Virginia, in addition to the two

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95 ALA. CONST. art. I, § 18; ALASKA CONST. art. I, § 10; ARIZ. CONST. art. II, § 28; ARK. CONST. art. II, § 14; CAL. CONST. art. I, § 18; COLO. CONST. art. II, § 9; CONN. CONST. art. IX, § 4; DEL. CONST. art. VI, § 3; FLA. CONST. art. I, § 20; GA. CONST. art. I, § 1, Para. 19; IDAHO CONST. art. V, § 5; IND. CONST. art. I, §§ 28, 29; IOWA CONST. art. I, § 16; KAN. CONST. Bill of Rights, § 13; KY. CONST. § 229; ME. CONST. art. I, § 12; MICH. CONST. art. I, § 22; MINN. CONST. art. I, § 9; MISS. CONST. art. III, § 10; MO. CONST. art. I, § 30; MONT. CONST. art. II, § 30; NEB. CONST. art. I, § 14; NEV. CONST. art. I, § 19; N.J. CONST. art. I, para. 17; N.M. CONST. art. II, § 16; N.C. CONST. art. I, § 29; N.D. CONST. art. I, § 17; OKLA. CONST. art. II, § 16; OR. CONST. art. I, § 24; S.C. CONST. art. I, § 17; S.D. CONST. art. VI, § 25; TEX. CONST. art. I, § 22; UTAH CONST. art. I, § 19; WASH. CONST. art. I, § 27; W. VA. CONST. art. II, § 6; WIS. CONST. art. I, § 10; WYO. CONST. art. I, § 26; ALA. CODE § 13A-11-2 (2005); ARK. CODE ANN. § 5-51-201 (2005); CAL. PENAL CODE § 37 (West 1999); COLO. REV. STAT. § 18-11-101 (2012); FLA. STAT. ANN. § 876.32 (West 2000); GA. CODE ANN. § 16-11-1 (2011); 720 ILL. COMP. STAT. ANN. 5/30-1 (2010); KAN. STAT. ANN. § 21-5901 (2012); LA. REV. STAT. ANN. § 14:113 (2004); MASS. ANN. LAWS ch. 264, § 1 (LexisNexis 2010); MICH. COMP. LAWS ANN. § 750.544 (West 2012); MINN. STAT. ANN. § 609.385 (West 2009); MISS. CODE ANN. § 97-7-67 (West 2011); MO. ANN. STAT. § 576.070 (West 2011); NEV. REV. STAT. § 196.010 (2011); OR. REV. STAT. § 166.005 (2011); R.I. GEN. LAWS § 11-43-1 (2002); VT. STAT. ANN. tit. 13 § 3401 (2009); VA. CODE ANN. § 18.2-481 (2009); WASH. REV. CODE § 9.82.010 (2008); W. VA. CODE ANN. § 61-1-1 (LexisNexis 2010); WIS. STAT. ANN. § 946.01 (West 2005).

96 GA. CONST. art. I, § 1, ¶ XIX (emphasis added). The statutory counterpart reverts to the term “levies war.” GA. CODE ANN. § 16-11-1(a) (2011).

97 See IND. CONST. art. I, § 28.

98 See GA. CODE ANN. § 16-11-1 (720 ILL. COMP. STAT. ANN. 5 / 30-1 (West 2010); KAN. STAT. ANN. § 21-5901 (2012). The treason laws in most states do not contain a knowledge requirement, and adding such language is arguably superfluous as treason is generally thought to be a specific intent crime. See, e.g., *United States v. Cramer*, 325 U.S. 1, 31 (1945) (“[T]o

branches of treason typically included, treason also consists of establishing a separate government within the state limits, holding or executing any office in such separate government, or resisting the execution of state laws under color of state authority.<sup>99</sup>

Surprisingly, a few states perpetuate some of the mistakes seen in the earliest definitions of state treason. Louisiana's definition of treason, for instance, includes levying war "*against the United States*" and adhering to the enemies "*of the United States*," even though the State lacks jurisdiction over such acts.<sup>100</sup> Louisiana's earliest treason law adhered to the more restrictive pattern, with the expansion not arising until more modern times.<sup>101</sup> Vermont continues to include in the definition of treason a conspiracy to levy war, as it has since 1797, whereas Minnesota specifically excludes conspiracy from its definition of levying war.<sup>102</sup> In this regard, Minnesota is more in line with the restrictive policy underlying American treason law.

The seven states currently without a treason law are Hawaii, Maryland, New Hampshire, New York, Ohio, Pennsylvania, and Tennessee.<sup>103</sup> Hawaii, as noted above, is unique in that it has never had a treason law since becoming a state.<sup>104</sup> The other six states all had treason laws at some point but repealed them.<sup>105</sup> The legislative records generally do not explain why

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make treason the defendant not only must intend the act, but he must intend to betray his country by means of the act.").

99 VA. CODE ANN. § 18.2-481(3)-(5) (2009).

100 LA. REV. STAT. ANN. § 14:113 (2004) (emphasis added).

101 Compare LA. CONST. art VI, § 2 (1812), with LA. REV. STAT. ANN. § 14:113 (2004).

102 Compare VT. STAT. ANN. tit. 13, § 3401 (West 2009), with MINN. STAT. ANN. § 609.385 (West 2009) and KAN. STAT. ANN. § 21-5901 (2012); see also N.D. R. CRIM. P. 31(e)(3) ("If a defendant is charged with treason or conspiracy to commit treason and more than one overt act is charged, the jury, before returning a verdict of guilty, must return a special verdict on each overt act charged.") (emphasis added).

103 See supra note 95 and accompanying text (explaining that forty-three states currently have laws defining treason).

104 Supra note 79 and accompanying text.

105 Maryland repealed its treason statute in 1953. See MD. CODE ANN., CRIM. LAW, art. 27, §§ 654-62 (1951) (defining treason against Maryland), repealed by Act of April 11, 1953, 1953 Md. Laws 775. New Hampshire repealed its treason statute in 1973. See N.H. REV. STAT. ANN. § 58:586 (1955) (defining treason against New Hampshire), repealed by Act of July 2, 1973, 1973 N.H. Laws 1010-11. New York's treason statute was omitted from the 1965 redrafting of the criminal code. See N.Y. PENAL LAW § 2516 (omitting from the code treason against New York, Article 212, §§ 2380-83). Ohio repealed its treason statute in 1974 with the redrafting of the criminal code. See OHIO REV. CODE ANN. § 2921.01 (LexisNexis 1953) (defining treason against Ohio), repealed by Act of Dec. 22, 1972, 1971 Ohio Laws 2033 (effective Jan. 1, 1974). Pennsylvania's treason statute was repealed in 1972 when the state redrafted its criminal code. See also 18 PA. CONS. STAT. ANN. § 4201 (West 1963) (defining treason against Pennsylvania), repealed by Act of Dec. 6, 1972, 1972 Pa. Laws 1482 (effective June 6, 1973). In addition, Tennessee repealed its treason statute in 1989 with the redrafting of the criminal code. TENN. CODE ANN. § 39-5-802 (1982) (defining treason against Tennessee), repealed by Tenn. Act of May 24, 1989, 1989 Tenn. Pub. Acts 1169.

the statutes were repealed, but repeal likely reflects a view that the likelihood of treason against a state is so remote as to render the need for the law obsolete.<sup>106</sup> Maryland repealed its law, for example, as part of a movement in the state to “remove many obsolete and out–moded provisions and to make the criminal laws more orderly and more brief.”<sup>107</sup> Perhaps these states were also persuaded by the position of the American Law Institute, which in 1962 omitted treason from the Model Penal Code because it fell within a category of crimes that “are peculiarly the concern of the federal government” and because the definition “is inevitably affected by special political considerations.”<sup>108</sup>

Even among the states that repealed the law, vestiges of the crime remain on the books. In New York, for example, the governor has the power to grant reprieves for all offenses except treason, although the governor can suspend execution of a treason sentence until the legislature has reviewed the sentence to decide whether to grant a pardon.<sup>109</sup> Provisions such as these are meaningless in the absence of a state treason law and their continued existence is best explained by inattentive state legislatures. Although legislatures may repeal the substantive offense, they fail to account for other provisions in their state’s law that refer to or incorporate the crime of treason.

A final observation about the current landscape deals with the source of the law. Of the forty–three states that define treason, twenty–one do so solely by constitutional provision,<sup>110</sup> sixteen do so by pairing a constitutional provision with a criminal statute,<sup>111</sup> and six do so solely by statute.<sup>112</sup> This raises the question whether the source of the law has any impact on its enforceability.

Most constitutional provisions declare broad principles of fundamental law that require action by the legislature to put them into effect, but a constitutional provision can be self–executing if it sufficiently articulates a rule that takes effect without the need for additional legislation.<sup>113</sup> However, a

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<sup>106</sup> *Id.*

<sup>107</sup> Act of April 11, 1953, § 1, 1953 Md. Laws 775.

<sup>108</sup> See MODEL PENAL CODE, Definition of Specific Crimes, 123 (Proposed Official Draft 1962).

<sup>109</sup> N.Y. CONST. art. 4, § 4.

<sup>110</sup> *Supra* note 95 (Alaska, Arizona, Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Maine, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming).

<sup>111</sup> *Supra* note 95 (Alabama, Arkansas, California, Colorado, Florida, Georgia, Kansas, Michigan, Minnesota, Mississippi, Missouri, Nevada, Oregon, Washington, West Virginia, and Wisconsin).

<sup>112</sup> *Supra* note 95 (Illinois, Louisiana, Massachusetts, Rhode Island, Vermont, and Virginia).

<sup>113</sup> See, e.g., *Dev. Pathways v. Ritter*, 178 P.3d 524, 530–31 (Colo. 2008); see also 16 AM. JUR. 2d *Constitutional Law* §§ 101, 104 (2009).

provision is not self-executing—and therefore non-justiciable—if it merely announces a principle but lacks the rules by which the principle is given the force of law.<sup>114</sup> The Treason Clause defines treason but leaves it to Congress to declare a punishment, suggesting that the provision is not self-executing because it cannot stand on its own without additional legislation.<sup>115</sup> One could argue, of course, that the Treason Clause is self-executing (and courts have not addressed the issue), but the fact that, after ratification of the Constitution, the first Congress promptly enacted a treason statute parrotting the text of the Treason Clause and providing a punishment suggests that additional legislation was necessary to give it effect.<sup>116</sup>

Regarding state practice, each of the twenty-one states that define treason solely by constitutional provision do so by defining treason against the state and then setting out procedural safeguards for treason trials (i.e., by stating that no person can be convicted except on the testimony of two witnesses or an open confession in court).<sup>117</sup> By defining the elements of the offense and establishing procedures for trial, the state constitutional provisions arguably articulate a rule that takes effect without the need of additional legislation, thus making them self-executing.

The better argument, however, as with the Treason Clause, is that the state constitutional provisions are not self-executing. None of the twenty-one states that define treason solely by constitutional provision include a penalty in the text of the constitution.<sup>118</sup> The result is that those states have created a public right of action without any corresponding penalty. Although this peculiarity has never been raised or addressed by a judicial body, if faced with this issue, a court would likely conclude that a state constitutional provision defining treason in this manner is not self-executing because additional legislation is required to give it legal force.<sup>119</sup> Thus,

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114 16 AM. JUR. 2d *Constitutional Law* §§ 101, 104 (2009).

115 U.S. CONST. art. III, § 3 (“The Congress shall have Power to declare the Punishment of Treason.”).

116 See An Act for the Punishment of Certain Crimes Against the United States, Ch. 9, 1 Stat. 112, 112 (1790) (“That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid or comfort within the United States or elsewhere, and shall be thereof convicted . . . of treason.”). Without deciding the issue, Professor Hurst lends some weight to the conclusion that the Treason Clause is not self-executing: “[I]n view of the legislative construction evidenced by the promptness with which the first Congress declared the crime of treason, substantially in the terms of the Constitution, it might be argued that Art. III, § 3 is not self-executing.” *Treason II*, *supra* note 19, at 420 n.128.

117 *Supra* note 95 (Alaska, Arizona, Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Maine, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming).

118 See *id.*

119 See, e.g., *Older v. Superior Court*, 157 Cal. 770, 780 (Cal. 1910) (“A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which

although forty-three states have treason laws on the books, there is a compelling argument that the law in twenty-one of those states is merely symbolic, having no practical impact.

### III. THE DEBATE OVER THE VALIDITY OF STATE TREASON LAWS

One might assume that there is not much to debate over the validity of state treason laws. After all, the debates at the Constitutional Convention show that the Framers specifically contemplated state treason and the text of the Constitution itself contemplates state treason laws in at least two places.<sup>120</sup> Nevertheless, from the beginning, there have been dissenting voices. I first summarize key judicial decisions and then look briefly at how the debate has unfolded in scholarly journals, criminal law treatises, and state legislative histories.

#### A. *Judicial Decisions Regarding State Treason*

State courts have decided surprisingly few cases involving state treason. Since ratification of the Constitution, state courts have completed only two treason prosecutions.<sup>121</sup> The first was Rhode Island's 1844 prosecution of Thomas Dorr; the second was Virginia's 1859 prosecution of John Brown.<sup>122</sup> In both cases, the defense argued that state treason is an unconstitutional usurpation of federal authority, but in both cases, the court held otherwise.<sup>123</sup>

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the right given may be enjoyed and protected, *or the duty imposed may be enforced*; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." (emphasis added) (citations omitted).

120 U.S. CONST. art. III, § 3 (Treason Clause); *id.* at art. IV, § 2 (Extradition Clause) ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

121 There were scattered treason prosecutions by states prior to ratification of the Constitution, but they are beyond the scope of this article. *See, e.g.*, *Respublica v. Carlisle*, 1 U.S. 35 (1778) (treason against Pennsylvania); *Respublica v. Roberts*, 1 U.S. 39 (1778) (same).

122 *The Trial of Thomas Wilson Dorr for Treason, Rhode Island, 1844*, in 2 AMERICAN STATE TRIALS 5 (Lawson ed. 1914); *The Trial of John Brown for Treason and Insurrection, Charlestown, Virginia, 1859*, in 6 AMERICAN STATES TRIALS 700 (Lawson ed. 1916).

123 *See* 2 AMERICAN STATE TRIALS, *supra* note 122, at 12-13; 6 AMERICAN STATES TRIALS 700 *supra* note 122 at 800.

1. *The Trial of Thomas Wilson Dorr*.—Following the revolution of 1776, most of the colonies adopted written constitutions, but Rhode Island opted to maintain the original charters granted by England.<sup>124</sup> Beginning in 1777 and continuing throughout the early nineteenth century, the majority of citizens in Rhode Island advocated for a written constitution, but each time, the Rhode Island General Assembly refused to call a constitutional convention.<sup>125</sup> Due to this consistent roadblock, “the people began to see clearly that the only remedy they had was to ignore the General Assembly and to proceed to form a new constitution independently of it.”<sup>126</sup> Thomas Wilson Dorr became the leader of the movement to bypass the General Assembly and form a written constitution.<sup>127</sup>

Dorr and his supporters formed the “Rhode Island Suffrage Convocation,” which pursued a “peaceful revolution . . . by ignoring the constituted authorities.”<sup>128</sup> In 1841, they drafted a constitution and submitted it for a state-wide vote, which passed, but was later invalidated by the state Supreme Court.<sup>129</sup> In 1842, the General Assembly passed a law forbidding anyone from attending meetings for the election of new state officers.<sup>130</sup> This law declared it treason to hold high office in any newly formed government. Undaunted, Dorr claimed his seat as governor in a newly formed government.<sup>131</sup> A short time later, supporters of the original government called an election of their own and elected Samuel King as governor. Thus, “[t]wo rival Governors and General Assemblies were now in existence.”<sup>132</sup>

Dorr and his supporters thereafter led an attack on the state arsenal in Providence in hopes of gaining possession of the state’s military supplies.<sup>133</sup> The attack was doomed from the start. Dorr’s supporters attempted to fire a

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124 2 AMERICAN STATE TRIALS, *supra* note 122, at 5.

125 *Id.* at 6. The original colonial charter, under which the General Assembly operated, limited suffrage to white landowners and their oldest sons. This sufficed in the early days of the colony, but as Rhode Island’s population of artisans, tradespeople, and professionals grew—many of whom did fit the category of people entitled to vote—so did the demand for suffrage and a general discontent with the General Assembly. *See id.* at 5–6 n.1.

126 *Id.* at 6.

127 *Id.* at 5.

128 *Id.* at 7.

129 *Id.* at 8.

130 Act of April 4, 1842, § 3, 1842 R.I. Pub. Laws 14. According to AMERICAN STATE TRIALS it was under this Act that Dorr was tried and convicted of treason. 2 AMERICAN STATE TRIALS, *supra* note 109, at 9. But Dorr’s alleged treason was for levying war against the state, and therefore he was likely charged under a different statute, which read as follows: “Treason against this State shall consist only in levying war against the same, or in adhering to the enemies thereof, giving them aid and comfort.” Act of Jan. 1838, § 1, 1838 R.I. Pub. Laws 3.

131 2 AMERICAN STATE TRIALS, *supra* note 122, at 9. In *Luther v. Borden*, 48 U.S. 1 (1849), the Supreme Court refused to say which government was legitimate, finding instead that it was a political question and therefore outside its purview. *Id.* at 42.

132 2 AMERICAN STATE TRIALS, *supra* note 122, at 10.

133 *Id.*

cannon but it had been doused in water and would not fire.<sup>134</sup> Dorr's forces quickly fled the state.<sup>135</sup> Governor King, who by now had declared martial law, issued a warrant for Dorr's arrest.<sup>136</sup> In August 1842, Dorr voluntarily returned to the state and was tried for treason for levying war against the state by leading an armed revolt in an attempt to establish himself as the new governor.<sup>137</sup>

At trial, Dorr argued that treason cannot be committed against a state. In his opening statement, Dorr's counsel told the jury that his first defense would be that, "in this country, treason is an offence against the United States only, and cannot be committed against an individual state."<sup>138</sup> The court considered that to be a purely legal question that would be decided by the court, not the jury.<sup>139</sup> The court therefore entertained the matter through a motion outside the hearing of the jurors.<sup>140</sup>

Dorr's counsel began by outlining in broad strokes the history of treason as an "offence against the sovereign power."<sup>141</sup> The sovereign power, according to the defense, is "the person who has the power of judging in the last resort," and "there can be no sovereign where there are many sov-

134 *Id.* at 10–11.

135 *Id.* at 11.

136 *Id.* ("Thus ended the Dorr war. Only one man lost his life, a Massachusetts man on Massachusetts soil, who was accidentally killed by a musket ball fired across the bridge.")

137 *Id.* As described by Chief Judge Durfee in his charge to the jury:

Each of these counts substantially charges, that the prisoner, being under the protection of the laws of this State, and owing allegiance and fidelity to the said State, not weighing the duty of his said allegiance, and traitorously devising and intending to stir up, move and excite insurrection, rebellion, and war against the said State, with force and arms, unlawfully and traitorously, did conspire, compass, imagine, and intend to raise and levy war, insurrection, and rebellion against the said State, and, in order to perfect, fulfill, and bring to effect the said compassings, imaginations, and intents of him, the said Thomas Wilson Dorr, he, . . . with a great multitude of persons, amounting to a great number, armed and arrayed in a warlike manner, being then and there unlawfully, maliciously, and traitorously, assembled and gathered together, did falsely and traitorously assemble and gather themselves together against the said State, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said State, and then and there, in pursuance of the said traitorous intentions and purposes aforesaid, he, the said Thomas Wilson Dorr, with the said persons so as aforesaid traitorously assembled and armed and arrayed, in manner aforesaid most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said State, contrary to the duty of his said allegiance and fidelity, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

2 AMERICAN STATE TRIALS, *supra* note 122, at 156.

138 JOSEPH S. PITMAN, REPORT OF THE TRIAL OF THOMAS WILSON DORR FOR TREASON 67–68 (Boston, Tappan & Dennet, 1844). The defense also argued that the court lacked jurisdiction because the alleged overt acts of treason occurred outside the county in which Dorr was tried, that Dorr was justified in acting as governor, and that the evidence did not support the charge of treasonable intent. *Id.*

139 *Id.* at 77.

140 *Id.* at 78.

141 *Id.*

ereigns, for there must be one person to judge in the last resort.”<sup>142</sup> But in this country, of course, the sovereign power resides not in a single person, but in all the People, collectively. Thus, the defense reasoned that offenses against the sovereign were offenses against the People of the United States collectively, not offenses against the people of a single state.<sup>143</sup>

The defense then drew distinctions between federal and state sovereignty under the Constitution. “Ultimate sovereignty” resided in the people of the United States, whereas states maintained a “qualified sovereignty” only.<sup>144</sup> Although states were sovereign in certain areas, the United States retained ultimate sovereignty in the realm of punishing offenses against the body politic. Thus, according to the defense, the power to define and punish treason was among the attributes of sovereignty that the states ceded to the national government.<sup>145</sup>

In response, the prosecution conceded two of Dorr’s premises; namely, that treason can only be committed against the sovereign power, and that that power in this country resides with the people.<sup>146</sup> Still, the prosecution argued, these concessions by no means led to the conclusions advanced by the defense. The prosecution chided the defense, saying, “I had always supposed that the people of this State were the sovereign power of the State, and I never, until now, heard the doctrine suggested, that the sovereign power of this State, resided in the people of the United States.”<sup>147</sup> The government of the United States, rather, is a “union of sovereignties.”<sup>148</sup> Moreover, “the right of self-protection and preservation” is inherent in the principle of sovereignty, and nowhere does the Constitution suggest that the states gave up that right by entering the Union.<sup>149</sup> The prosecution also looked to the Constitutional Convention debates, the text of the Constitution, the practice among the states of criminalizing treason, and a majority of treatise writers.<sup>150</sup>

The prosecution concluded its presentation with a reference to Justice Joseph Story’s charge to a federal grand jury in Rhode Island in 1842.<sup>151</sup> In his charge, Justice Story distinguished between treason against the United

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<sup>142</sup> *Id.* at 79 (citations omitted).

<sup>143</sup> *Id.* at 79–80.

<sup>144</sup> JOSEPH S. PITMAN, REPORT OF THE TRIAL OF THOMAS WILSON DORR FOR TREASON 80 (Boston, Tappan & Dennet 1844).

<sup>145</sup> *Id.* at 81.

<sup>146</sup> *Id.* at 82.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 83.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 83–84 (“The opinion of Mr. Justice Story, delivered here, in this very hall, fully sustains the doctrine for which we contend, and enforces it in clear, cogent, and logical terms.”).



States and treason against a state, a distinction based on intent and the focus of the overt acts. According to Justice Story, an act of war aimed at the sovereignty of a particular state—by, for example, attempting to overturn the state government or constitution, prevent the exercise of sovereign powers, or resist execution of valid laws—is treason against the state, and against the state only.<sup>152</sup> But Story also noted that an overt act, although initially aimed against state authorities, could be “mixed up or merged” into treason against the United States and thereby become a federal crime.<sup>153</sup> The case against Dorr, according to the prosecution, fell squarely within the class of treasonous acts aimed solely at the state, acts that did not implicate the federal sovereign.<sup>154</sup>

The court sided with the prosecution, reasoning that “wherever allegiance is due, there treason may be committed.”<sup>155</sup> Because states demand allegiance of their citizens, “treason may be committed against a State of this Union.”<sup>156</sup> As to the meaning of sovereignty within the federal system, the court implied that the sovereign power retained by the states included the power to protect itself through treason laws. “The power to provide for the punishment of this crime, the Legislature derives, not from the United States, or the people thereof, but from our own people, from the organized sovereign people of the State.”<sup>157</sup>

The court also noted that its conclusion was consistent with the result of the debates in the Constitutional Convention, the text of the Constitution, comments by other state courts, commentators on the law, and the practice of other state legislatures.<sup>158</sup> Taking these points together, the court held

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152 Charge to Grand Jury, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (Case No. 18,275).

153 *Id.* Justice Story stated, in relevant part, as follows:

[T]reason may be begun against a state, and may be mixed up or merged in treason against the United States. Thus, if the treasonable purpose be to overthrow the government of the state, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the state, that would be treason against the United States. So, if the troops of the United States should be called out by the president, in pursuance of the duty enjoined by the constitution, . . . to protect the state against domestic violence, and there should be an assembly of persons with force to resist and oppose the troops so called out by the president, that would be a levy of war against the United States, although the primary intention of the insurgents may have been only the overthrow of the state government or the state laws.

*Id.*

154 PITMAN, *supra* note 144, at 83–84.

155 2 AMERICAN STATE TRIALS, *supra* note 122, at 153.

156 *Id.*

157 *Id.* at 155.

158 *Id.* at 154–55. The court’s textual argument was based on Article IV, § 2. U.S. CONST. art. III, § 3 (“The Congress shall have Power to declare the Punishment of Treason.”). Neither the parties’ arguments nor the court’s decision cite to other state-court decisions, so it is unclear what other state courts are referred to. As to the practice of other states, the court stated that eleven out of twenty-six states had constitutional or statutory provisions defining and punishing the crime. As to the remaining fifteen states, “[t]he probability is, that, if they

that Rhode Island's statute against treason was "constitutional and binding on all, and that the sovereign authority of this State is such, that treason can be committed against it."<sup>159</sup>

The court that tried Dorr consisted of the same Supreme Court judges who had previously ruled against the legality of the Dorr movement, and there was not a single "Dorrite" on the jury.<sup>160</sup> The jury quickly convicted Dorr and the court sentenced him to life imprisonment.<sup>161</sup> Within one year of his incarceration, however, with public opinion firmly in Dorr's corner, the General Assembly passed a law releasing Dorr from prison.<sup>162</sup>

2. *The Trial of John Brown*.—The story of John Brown's raid on Harper's Ferry, Virginia (now West Virginia) is a fixture in American history and has been well chronicled.<sup>163</sup> John Brown was an anti-slavery activist with a history of violence and biting rhetoric.<sup>164</sup> On October 16, 1859, Brown led a group of twenty-one men across the Potomac River from Maryland to Virginia.<sup>165</sup> Brown's goal was to incite southern slaves to abandon their homes, join his band, and wage open warfare over the issue of slavery.<sup>166</sup> Brown and his men descended on Harper's Ferry, took possession of the United States armory, and captured several prominent citizens.<sup>167</sup> Brown and his hostages were driven into the town's engine house, and after a short-lived standoff that included "much firing from both sides," federal troops under the command of Robert E. Lee broke down the door of the engine house and crippled Brown with a sword.<sup>168</sup>

Virginia indicted Brown for treason by levying war, conspiring to induce slaves into insurrection, and murder.<sup>169</sup> His trial began on October 21, 1859,

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were examined, we should find . . . that the whole twenty-six, have defined this crime, and made provision for the punishment of it." 2 AMERICAN STATE TRIALS, *supra* note 122, at 155.

159 2 AMERICAN STATE TRIALS, *supra* note 122, at 155.

160 *Id.* at 12.

161 *Id.* at 164, 170.

162 *Id.* at 14; *see also* Act of June 1845, 1845 R.I. Pub. Laws 11–13.

163 For a narrative of John Brown's raid and subsequent trial for treason, see, e.g., Steven Lubet, *John Brown's Trial*, 52 ALA. L. REV. 425 (2001). For a more detailed look, see BRIAN MCGINTY, *JOHN BROWN'S TRIAL* (Harvard University Press 2009).

164 6 AMERICAN STATE TRIALS, *supra* note 122, at 700 n.2 (Brown was "very hostile to all slave owners. He denounced slavery in language fierce and bitter, declaring that slave holders had forfeited their right to live, and that the slaves had the right to resort to any means to rid themselves of their masters and gain their liberty.").

165 *Id.* at 700–01, n.3.

166 *Id.* at 703.

167 *Id.* at 703–04, n.2.

168 *Id.* at 706–07.

169 *Id.* at 723–24. The indictment on the treason account reads, in relevant part, as follows:

less than a week after the raid.<sup>170</sup> Brown's trial drew national attention and quickly became a referendum on slavery and the abolitionist movement, with powerful interests and voices on both sides. Virginia's prosecution was about more than treason; it was a public defense of slavery.<sup>171</sup>

Brown's trial raised several significant issues relating to treason against a state. Brown's legal team mounted a multi-pronged defense. They argued that Brown lacked treasonous intent.<sup>172</sup> Brown was painted as an idealistic renegade whose intent was to free the slaves, not to overthrow the state government.<sup>173</sup> The defense also attacked the indictment because it failed to charge Brown as a citizen of Virginia. According to Brown's lawyers, "no man is guilty of treason, unless he be a citizen of the State of Government against which the treason so alleged has been committed."<sup>174</sup> Thus, because Brown was not a Virginian, he "was not bound by any allegiance to this State, and could not, therefore, be guilty of rebellion against it."<sup>175</sup> The defense also argued that, if treason were proved, it must only be treason against the United States because Brown and his band "were rather guilty of resisting Colonel Lee, which was resistance to the Federal Government, and not to the Commonwealth."<sup>176</sup>

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The Jurors of the Commonwealth of Virginia, . . . upon their oaths do present that John Brown, . . . together with divers other evil-minded and traitorous persons to the jurors unknown, not having the fear of God before their eyes, but being moved and seduced by the false and malignant counsel of other evil and traitorous persons and the instigations of the devil, did severally, on the sixteenth, seventeenth, and eighteenth days of the month of October, in the year of our Lord eighteen hundred and fifty-nine, and on divers other days before and after that time, within the Commonwealth of Virginia, . . . feloniously and traitorously make rebellion and levy war against the said Commonwealth of Virginia . . .

*Id.* at 724, n.28.

<sup>170</sup> *Id.* at 708.

<sup>171</sup> Lubet, *supra* note 163, at 437 ("In brief, Governor Wise's decision to charge treason in a Commonwealth court transformed John Brown's trial into something very much like a referendum on the unity of the nation. . . . Prosecution in federal court would have carried with it at least a veneer of regional neutrality, but the Virginia proceeding made it clear that the case against John Brown was also intended as a defense of slavery itself.") (citations omitted); see also MCGINTY, *supra* note 163, at 287 ("Viewed in the long lens of history, it is clear that John Brown was not really on trial in Charleston. Slavery was.").

<sup>172</sup> *Id.* at 769 (Brown's lawyer stating that "[w]e hope to prove the absence of malicious intention.").

<sup>173</sup> *Id.* at 782-85. Brown's lawyer did not dispute the facts, only their implications:

These men, it appears, assembled at a certain place, as the defendant himself indeed admits they did, and from that admission he does not shrink, for the purpose of running away with slaves. That is a crime, and for that crime he is amenable to the laws of your State, and for which you can punish him to the extent of that law.

*Id.* at 782.

<sup>174</sup> *Id.* at 782.

<sup>175</sup> *Id.*; see also *id.* at 792 (Brown's lawyer arguing that "treason could not be committed against a Commonwealth except by a citizen thereof.").

<sup>176</sup> *Id.* at 793.

The court rejected each of these arguments. Most of the attention focused on the argument that only citizens owing allegiance to a state could be guilty of treason. The prosecution responded that treason did not require citizenship. Instead, any person residing in the state, even temporarily, owed allegiance to the state. Under this view, “when [Brown] came to Virginia and planted his feet on Harper’s Ferry, he came there to reside and hold the place permanently.”<sup>177</sup> Following the closing arguments, Brown’s counsel requested a jury instruction that “if they believed the prisoner was not a citizen of Virginia, but of another State, that they cannot convict on a count of treason,” but the court refused.<sup>178</sup> The jury deliberated for only forty–five minutes, after which they pronounced Brown guilty on all counts, and the court sentenced him to death by hanging.<sup>179</sup>

Curiously, at no point leading up to or during trial did Brown’s defense team argue that treason cannot be committed against a state. Surely the experience from Dorr’s trial should have at least alerted them to the argument. After the trial, however, the defense did attempt to argue for the first time that treason could not be committed against a state.<sup>180</sup> Following the jury verdict, the defense immediately made a motion to arrest the judgment.<sup>181</sup> The next day, the court “hear[d] . . . the motion in the Brown case, which was argued at length by counsel on both sides.”<sup>182</sup> The existing records, unfortunately, provide little detail about the substance of those arguments. One record indicates that two additional lawyers arrived from Boston on that day, so perhaps they advanced the strategy of attacking the verdict from a new angle.<sup>183</sup> The defense, citing writings by Justice Story, argued that “treason could not be committed against a state, but only against the [federal] government.”<sup>184</sup> It is not clear which writings of Justice Story’s were cited, although the most likely candidate is his influential *Commentaries on the Constitution*, published in 1833, in which he casts mild doubt on the notion that state treason can exist independently of treason against the United States.<sup>185</sup> Whatever the precise argument, it did not persuade the

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177 *Id.* at 797 (alteration in original).

178 *Id.* at 799.

179 6 AMERICAN STATE TRIALS, *supra* note 122, at 799–800, 802.

180 *Id.* at 800.

181 *Id.* A motion to arrest judgment was a procedural device in Virginia to challenge rulings made during the trial. The motion was made before the sentence was passed to give the court a chance to fix correctable errors or, if necessary, vacate the judgment and order a new trial. *See* MCGINTY, *supra* note 164, at 218.

182 6 AMERICAN STATE TRIALS, *supra* note 122, at 800.

183 THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN 94 (New York, Robert M. DeWitt 1859). The Boston lawyers arrived to assist in the defense of Edwin Coppie, Brown’s lieutenant, who was tried immediately after Brown’s conviction. *Id.*

184 MCGINTY, *supra* note 164, at 219.

185 *See* STORY, *supra* note 87, at 173 (“The power of punishing the crime of treason

court. "On the objection that treason cannot be committed against a State," the court ruled, "wherever allegiance is due, treason may be committed. Most of the States have passed laws against treason."<sup>186</sup>

3. *Other State Treason Cases that were Dismissed or Abandoned Before Trial.*—Several other cases deserve mention although they were dismissed on legal grounds or otherwise abandoned prior to trial. Moving in chronological order, the first is *People v. Lynch*.<sup>187</sup> During the War of 1812, Mark Lynch, Aspinwall Cornell, and John Hagerman provided food and supplies to British ships.<sup>188</sup> The State of New York indicted the men for treason by adhering to the state's enemies at a time of open war between the United States and Great Britain.<sup>189</sup> But the court dismissed the indictment because the acts charged did not amount to treason against the state.<sup>190</sup> This conclusion flowed from the fact that the United States, not the State of New York, had declared war against Great Britain, and therefore the British soldiers who had received food and supplies at the defendants' hands were not enemies of the State of New York:

*Great Britain* cannot be said to be at war with the state of *New-York*, in its aggregate and political capacity, as an independent government, and therefore, not an enemy of the state, within the sense and meaning of the statute. The people of this state, as citizens of the *United States*, are at war with *Great Britain*, in consequence of the declaration of war by Congress. The state, in its political capacity, is not at war. The subjects of *Great*

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against the United States is exclusive in congress; and the trial of the offence belongs exclusively to the tribunals appointed by them. A state cannot take cognizance, or punish the offence; whatever it may do in relation to the offence of treason, committed exclusively against itself, *if indeed any can case can, under the constitution, exist*, which is not at the same time treason against the United States.") (emphasis added). However, as we have already seen, Justice Story's view of state treason, as expressed in his charge to a federal grand jury in Rhode Island, contemplates that state treason may exist in narrow circumstances. *See* Charge to Grand Jury, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (Case No. 18,275).

<sup>186</sup> 6 AMERICAN STATE TRIALS, *supra* note 122, at 800.

<sup>187</sup> *People v. Lynch*, 11 Johns. 549 (N.Y. Sup. Ct. 1814).

<sup>188</sup> *Id.* at 552.

<sup>189</sup> The court described the indictment as follows:

The indictment, containing several counts which are substantially alike, after setting out a state of war between the *United States* and *Great Britain*, declared and carried on under the authority of the *United States*, alleges, that the prisoners, being citizens of the state of *New-York*, and of the *United States of America*, as traitors against the people of the state of *New-York*, did adhere to, and give aid and comfort to the enemy, by supplying them with provisions of various kinds, on board a public ship of war, upon the seas.

*Id.* at 552.

<sup>190</sup> *Id.* at 553.

*Britain* are the enemies of the *United States of America*, and the citizens thereof, as members of the union, and not of the state of *New-York*, as is laid in the indictment. . . . [A]dmitting the facts charged against the prisoners amount to treason against the *United States*, they do not constitute the offen[s]e of treason against the people of the state of *New-York*, as charged in the indictment.<sup>191</sup>

Thus, although the defendants had breached their allegiance in providing aid and support to British troops, it was a breach of their allegiance to the United States, which was not actionable in state court.<sup>192</sup> According to the *Lynch* court, “the jurisdiction of the state courts does not extend to the offen[s]e of treason against the *United States*.”<sup>193</sup>

It is tempting to read *Lynch* broadly for the proposition that treason cannot be committed against a state.<sup>194</sup> But such a broad reading is not supportable. The court in *Lynch* was careful to limit its holding to the facts of that case, *viz*, an indictment for treason by adhering to the enemy during a time when the United States had declared war on a foreign power. The court explicitly noted that “there can be no doubt but such a state of things might exist, as that treason against the people of this state might be committed.”<sup>195</sup> The court even provided examples of the kind of conduct that might amount to state treason:

This might be, by an opened and armed opposition to the laws of the state, or a combination and forcible attempt to overturn or usurp the government. And, indeed, the state, in its political capacity, may, under certain special circumstances, pointed out by the constitution of the *United States*, be engaged in war with a foreign enemy.<sup>196</sup>

Next are two cases instituted by different states but directed at the same individual: Joseph Smith, the founder of the Church of Jesus Christ

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191 *Id.*

192 *Id.*

193 *Id.* at 553–54.

194 At least one writer has read *Lynch* broadly for the proposition that treason cannot be committed against a state. See Gordon A. Madsen, *Joseph Smith and the Missouri Court of Inquiry*, 43:4 BYU STUD. Q. 113–15, 120 (2004), available at <https://byustudies.byu.edu/showTitle.aspx?title=6905> (examining charges against Joseph Smith for treason by levying war against Missouri and concluding, based on *Lynch*, that “treason can only be committed against the United States, not against an individual state, as clarified by the *Lynch* case in 1814”).

195 *Lynch*, 11 Johns at 552–53.

196 *Id.* at 553. Regarding the court’s assessment that a state may in limited circumstances be involved in a war with a foreign enemy, see *infra* note 325 and accompanying text.

of Latter-Day Saints (the "Mormons"). Smith faced treason charges twice, once by the State of Missouri in 1838, and again by the State of Illinois in 1844.<sup>197</sup>

Mormon settlers arrived in Jackson County, Missouri, in 1831.<sup>198</sup> Within a few years, to counter the Mormons' increasing influence, prominent members of the County entered a "secret constitution" or "Manifesto of the Mob," which endorsed vigilantism and aimed to expel the Mormons from the County.<sup>199</sup> The Mormons were forced from Jackson County and settled in nearby counties. The friction, however, did not cease. Non-Mormons in the new locales distrusted and persecuted the Mormons, largely due to their religious beliefs.<sup>200</sup> The Mormons began to fight back. When Governor Lilburn Boggs learned that the Mormons had taken up arms, he directed the state militia to treat the Mormons as enemies who "*must be exterminated* or driven from the state, if necessary for the public good."<sup>201</sup> Several days later, eighteen or nineteen Mormons were killed in a massacre at Haun's Mill, Caldwell County.<sup>202</sup> Smith and other Mormon leaders were arrested and, after a preliminary examination by Judge Austin A. King, bound over on charges of treason and other crimes.<sup>203</sup> Before a formal trial occurred, however, the prisoners escaped—probably with the connivance of the jailors—and fled to Illinois.<sup>204</sup>

In Illinois, the Mormons founded a new city called Nauvoo. With the Missouri difficulties still fresh, the Mormons distrusted state authority and sought to build a society based on autonomy and self-sufficiency.<sup>205</sup> In 1840, the Illinois legislature granted Nauvoo a city charter that, by today's standards, gave extraordinary powers to the city, including the power to keep its own militia and grant writs of habeas corpus.<sup>206</sup> Legal historians Edwin Brown Firmage and Richard Collin Mangrum note that the citizens of Illinois viewed the Mormons' assumption of broad authority under the city charter as a "Mormon attempt[] to create a sovereign political body under the federal system, distinct from the state of Illinois."<sup>207</sup>

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197 See EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS* 63-79 (Missouri charges) and 113-120 (Illinois charges) (University of Illinois Press 1988).

198 *Id.* at 63.

199 *Id.*

200 *Id.* at 70.

201 *Id.* at 74.

202 *Id.*

203 FIRMAGE & MANGRUM, *supra* note 197 at 74-76.

204 *See id.* at 77.

205 *See id.* at 83.

206 *See id.* at 84-85.

207 *Id.* at 99. The authors also note that the powers granted under the city charter were not unusual for the time period. *See id.* at 85-86.

Although many factors contributed to friction between the Mormons and the citizens of Illinois, public sentiment against the Mormons exploded when the Nauvoo city council passed a resolution calling for the destruction of a libelous press.<sup>208</sup> Destruction of the press infuriated non-Mormons who viewed the move as a willful disregard of state laws.<sup>209</sup> Smith and other Mormon leaders were charged with riot, but fearing for their safety, they initially refused to leave Nauvoo to answer the charges.<sup>210</sup> With attack impending on Nauvoo, Smith declared martial law and called out the city's militia. The act of calling out the militia led to treason charges, even though no shots were fired and Smith later urged the Mormons to surrender their arms to state authorities.<sup>211</sup> Before Smith could answer the treason charges, a vigilante mob stormed the jail where he and his brother Hyrum Smith were being held and killed them both.<sup>212</sup>

Speaking about the Missouri and Illinois charges, Professor Hurst concludes that charging the Mormon leaders with treason was "severe" and that "it seems likely that on a fair trial a limited purpose of self-defense, rather than intent to set up a rival government, could have been made out."<sup>213</sup> In addition to self-defense, the charges against Smith likely would have failed due to a lack of treasonous intent and other legal deficiencies.<sup>214</sup> In short, the story of the Mormons in Missouri and Illinois is one of mu-

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208 *See id.* at 106–113. Firmage and Mangrum conclude that the destruction of the press "was the death-knell for the legal sanctuary the Mormons had created in Nauvoo." *Id.* at 113.

209 DALLIN H. OAKS & MARVIN S. HILL, *CARTHAGE CONSPIRACY 15* (University of Illinois Press 1975).

210 *Id.* at 15–16.

211 *See id.* at 16–18.

212 *Id.* at 20–21.

213 *Treason III*, *supra* note 19, at 849, app. I (citing various sources on Smith's arrests in Illinois and Missouri). Years after Smith's death, Illinois Governor Thomas Ford acknowledged the dubious nature of the Illinois treason charges. He wrote: "If [the Mormons'] opponents had been seeking to put the law in force in good faith, and nothing more, then an array of a military force in open resistance to the *posse comitatus* and the militia of the State, most probably would have amounted to treason. But if those opponents merely intended to use the process of the law . . . as cats-paws to compass the possessions of their persons for the purpose of murdering them afterwards, as the sequel demonstrated the fact to be, it might well be doubted whether they were guilty of treason." THOMAS FORD, *HISTORY OF ILLINOIS* 337 (Chicago, S.C. Griggs & Co. 1854).

214 *See* Madsen, *supra* note 194, at 119–20 (concluding that the Missouri charges suffered from numerous legal defects, including a disregard for statutorily mandated minimums of due process, lack of an overt act to levy war, the alleged acts of treason occurred outside the county in which Smith was charged, and the violation of the two-witness rule required for each overt act of treason); *see also* 3 *HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 277–81 (B.H. Roberts, ed., 1974) (containing text of a petition to the Missouri Supreme Court arguing that Smith was imprisoned on false testimony, did not levy war against the state, did not commit any overt acts, and other points).



tual recrimination and distrust on the edges of the American frontier, not treason.

Another important case that was dismissed on legal grounds prior to trial is *Ex parte Quarrier*.<sup>215</sup> The issue was whether William Quarrier, a southern lawyer who had voted for secession and entered into military service for the Confederate States, should be admitted to practice law in West Virginia. At the conclusion of the Civil War, Quarrier took the amnesty oath and received a presidential pardon.<sup>216</sup> When Quarrier sought admission to the bar of the newly made State of West Virginia, the State argued that Quarrier's former treason against the United States disqualified him from practicing law because a felony disqualified a lawyer from practicing in the state.<sup>217</sup> The State argued that "the war being waged against the United States, of which the State of West Virginia was one, was...waged against her in the sense contemplated in the statute against treason, and therefore, the acts in question were treason against the State . . ."<sup>218</sup>

The court rejected this reasoning, holding instead that treason against the United States, for which Quarrier had been pardoned, could not be merged into treason against the State. Rather, to qualify as treason against the State, the act must be directed at the State specifically:

[T]o constitute treason against the State, it is not enough to wage war against the United States generally or collectively, or as component parts of the national Union, but it must be done directly against the State, in particular, by invading her territory, attacking her citizens, subverting her government and laws, or attempting her destruction by force . . .<sup>219</sup>

Another case, *Pennsylvania v. O'Donnell*, sprang out of the 1892 Homestead riots in Pennsylvania.<sup>220</sup> The case started as a labor dispute over wages between the Carnegie Steel Company and some of its employees. When negotiations broke down, employees organized a strike and "arranged and perfected an organization of military character."<sup>221</sup> The military organization surrounded the steel mill with armed men.<sup>222</sup> Carnegie Steel sought help from the county sheriff, who, after attempting to provide protection,

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215 *Ex parte Quarrier*, 2 W. Va. 569 (1866).

216 *Id.* at 569-70.

217 *Id.* at 570-71.

218 *Id.* at 572.

219 *Id.*

220 "The Homestead Case," 1 Pa. D. 785 (Pa. O. & T. Oct. 1892)

221 *See id.* at 786-87.

222 *Id.* at 787.

was driven off by threats of violence.<sup>223</sup> Skirmishes broke out, some were killed on both sides, and eventually the governor called out the state militia to restore order.<sup>224</sup>

The state sought indictments against the leaders of the strike for treason.<sup>225</sup> Edward Paxson, the Chief Justice of the Pennsylvania Supreme Court, personally charged the grand jurors. “You will [ ] observe,” he told the jurors, “that the offence charged is treason against this state, and not the United States; it is a matter with which the latter have nothing to do, and over which its courts have no jurisdiction.”<sup>226</sup> Then, taking a broad view of treason, Justice Paxson instructed the grand jurors as follows:

[W]hen a large number of men arm and organize themselves by divisions and companies, appoint officers, and engage in a common purpose to defy the law, to resist its officers, and to deprive any portion of their fellow-citizens of the rights to which they are entitled under the constitution and laws, it is a levying of war against the state, and the offense is treason.<sup>227</sup>

Several leaders were indicted, but the indictments were later quietly dropped.<sup>228</sup> Justice Paxson’s charge was roundly criticized as an example of overbroad application of treason laws.<sup>229</sup>

Following *O’Donnell*, state courts were silent on the topic of state treason for over fifty years. Not until 1954 would another state court wade into state treason, and even then the court’s discussion was collateral to the issue under review. In *Ohio v. Raley*,<sup>230</sup> three defendants were separately indicted for contempt of the Ohio Un-American Activities Commission (the “Commission”). After having been sworn as witnesses before the Commission, the defendants each refused to testify in response to certain questions.<sup>231</sup> The defendants fought the charges by attacking the legitimacy of the Commission, arguing, among other things, that in creating a Commission to investigate persons or groups suspected of subversive activities against Ohio *and* the United States, the state legislature had “invaded a field of government

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223 *Id.*

224 *Id.* at 787–88.

225 *Id.* at 786.

226 *Id.* at 786–90.

227 *See id.* at 790.

228 *Treason III*, *supra* note 19, at 823–24.

229 *Id.* at 824 (“Significantly, the treason charge met with prompt and unanimous criticism from conservative professional sources.”).

230 *Ohio v. Raley*, 136 N.E.2d 295, 302 (Ohio Ct. App. 1954), *vacated by* *Morgan v. Ohio*, 354 U.S. 929 (1957), *adhering to former judgment in* *Ohio v. Morgan*, 147 N.E.2d 847 (1957), *aff’d in part and rev’d in part by* *Raley v. Ohio*, 360 U.S. 423 (1959).

231 *Id.*

in which the United States government [had] paramount authority under the Constitution of the United States[.]”<sup>232</sup>

In analyzing the Commission’s authority to investigate subversive activities against both sovereigns, the court rejected the implication in the defendants’ argument that treason could not be committed against a state. The court reasoned that the authority to guard against sedition and treason was not among the aspects of sovereignty transferred to the United States:

We think it is also implied that there is no such thing as sedition or treason against an individual state. We cannot agree with either of these claims. Sedition and treason against the United States as a sovereign entity are necessarily offenses also against every sovereign state of the federal Union. Their relation to one another is fixed by the United States Constitution, which, by its terms, makes the United States government, within its domain, paramount. However, it leaves the states paramount sovereigns in all governmental matters not transferred to the United States government.<sup>233</sup>

Thus, when viewed through the lens of dual sovereigns, “[t]hat sedition and treason are proper subjects of state action, there can be no doubt.”<sup>234</sup>

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Several important lessons and conclusions can be drawn from these state treason cases. First, no court has held that states lack the power to define and punish treason. In fact, to date, all of the cases do the opposite by endorsing state treason. *Dorr* and *Brown* explicitly hold that state treason is a valid exercise of state power, and the others do so implicitly.<sup>235</sup> Second, nearly all of the treason prosecutions at the state level have dealt with allegations of treason by levying war against the state. Only one case, *Lynch*, involved treason for adhering to the state’s enemies. Third, several cases, most notably *Lynch* and *Quarrier*, acknowledge that state laws cannot reach conduct aimed against the United States.<sup>236</sup> Finally, we see in at least two cases—the case against the Mormon leaders and the case following the Homestead riots—unfortunate examples of how a state’s treason law

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<sup>232</sup> *Id.* at 304.

<sup>233</sup> *Id.* at 305.

<sup>234</sup> *Id.* at 306.

<sup>235</sup> 2 AMERICAN STATE TRIALS, *supra* note 122; 6 AMERICAN STATE TRIALS, *supra* note 122.

<sup>236</sup> *People v. Lynch*, 11 Johns. 549, 553–54 (N.Y. Sup. Ct. 1814); *Ex parte Quarrier*, 2 W.Va. 569, 572 (1866).

can be applied broadly as a tool against religious minorities or political opponents.<sup>237</sup>

### B. *The Scholarly Debate over State Treason*

For the founding generation, there seems to have been little doubt that states could punish treason. In his famous lectures to students at the University of Pennsylvania, for example, James Wilson lectured at length on “treason against the United States, *and against the state of Pennsylvania*.”<sup>238</sup> Other commentators from that early time period agreed that states could criminalize the offense.<sup>239</sup>

By the early nineteenth century, some commentators had started to preach that state treason was impossible. Edward Livingston is the most notable example. In 1821, the Louisiana General Assembly appointed Livingston to draft a criminal code.<sup>240</sup> Livingston omitted the crime of treason from his draft code, explaining that “from the nature of the federal union, a levy of war against one member of the union is a levy of war against the whole; therefore it is concluded, that treason against the state, being treason against the United States, it is to be punished under their laws and in their courts.”<sup>241</sup> Although Livingston’s draft code was widely praised by scholars in this country and in Europe, it was never formally adopted by the Louisiana legislature.<sup>242</sup> Still, Livingston’s purposeful omission of a provision on treason reflects the view of one of the early nineteenth century’s best legal minds.

The debate over state treason lasted throughout the nineteenth century. Some commentators held that the states could define and punish treason<sup>243</sup> while others held that treason was a crime left solely to the United

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237 See FIRMAGE & MANGRUM, *supra* note 197.

238 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 95 (Bird Wilson, ed., Philadelphia, Bronson and Chauncey 1804) (emphasis added).

239 See, e.g., 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT; AND OF THE COMMONWEALTH OF VIRGINIA 76–92, n.1–19 (Philadelphia, William Young Birch and Abraham Small 1803) (discussing application of law of treason against the United States and the Commonwealth of Virginia).

240 1 EDWARD LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 4 (New York, National Prison Association of the United States of America 1873).

241 *Id.* at 245.

242 See Eugene Smith, *Edward Livingston, and the Louisiana Codes*, 2 COLUM. L. REV. 24, 35–36 (1902).

243 See, e.g., 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 82 (Boston, Little, Brown, and Co., 4th ed., 1868) (“Treason . . . is a crime against either the United States or an individual State, according as it aims at the subjugation of the one government or the other.”); *id.* at 524 (stating summarily that “[i]n this country, treason is either against

States.<sup>244</sup> The debate continued through the middle of the nineteenth century. Chancellor James Kent, in the 1848 edition of his influential *Commentaries on American Law*, noted that it was “a question of grave discussion how far treason might be committed against one of the United States separately considered.”<sup>245</sup> And Timothy Walker, founder of the University of Cincinnati Law School, stated in his 1860 edition of *Introduction to American Law* that “the point has never been definitely settled, and is one of no small difficulty.”<sup>246</sup>

The most thorough discussion of state treason appeared in 1845 when the *American Law Magazine* published an article analyzing the contours of state treason by levying war.<sup>247</sup> The article made a compelling constitutional case for limiting state treason laws. It started by reading together two

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the United States or a particular State”); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 306 (Philadelphia, H.C. Carey & I. Lea 1825) (“Similar acts committed against the laws or government of a particular state, are punishable according to the laws of that state, but do not amount to treason against the United States.”); WILLIAM C. ROBINSON, ELEMENTARY LAW 254 (Boston, Little, Brown, and Co. 1882) (“Treason against an individual State, in the absence of Constitutional or statutory provision, is an offence at common law, and is so recognized in the Constitution of the United States. Like treason against the United States, it consists only in levying war against the State, or in adhering to the public enemy.”); 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES 618–19 (Henry St. George Tucker, ed., Chicago, Callaghan & Co. 1899) (“[The Treason Clause] defines only treason against the United States. Treason against a State is left to its own definition. . . . [Article IV, sec. 2] clearly refers to a treason against a State, of which it alone could have jurisdiction.”).

244 See, e.g., ISRAEL WARD ANDREWS, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 225 (New York, Van Antwerp, Bragg & Co. 1874) (“As treason is a crime against sovereignty, a violation of one’s allegiance, there can be no treason against a particular State. If a State, by its Courts, punishes treason, it must be not as treason against itself, but as treason against the Union; and in this view the propriety of that State legislation which affixes to it particular penalties is doubtful.”); JOEL ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS, AND MODES OF PROCEEDING 56 (New York, Charles Scribner and Co. 1867) (“Treason is a crime against sovereignty, a violation of one’s allegiance. Hence, there really is no such thing as treason against any political body in the Union but the United States. If a State, by its courts, punishes treason, it must be not as treason against itself, but as treason against the Union; and, in this view, the propriety of that State legislation which defines treason against the State and affixes to it particular penalties, is doubtful.”); 1 TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW DESIGNED AS A FIRST BOOK FOR STUDENTS 535 (Boston, Little, Brown, and Co., 4th ed. 1860) (“We have before seen that is questionable whether treason may not also be a State crime. Many of the States so regard it, and make provision for its punishment. . . . But it is evident that to make treason a State crime, there must be some different definition; because each State being a part of the United States, the acts embraced in the foregoing definition, though committed against a single State, would still be treason against the United States.”).

245 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 403 n.a (New York, William Kent, 6th ed. 1848).

246 WALKER, *supra* note 244, at 154.

247 *Can the Crime of Treason Be Committed Against One of the United States?*, 4 AM. L. MAG. 318 (1845).

provisions of the Constitution. Reading the language of Article I, § 8, and Article IV, § 4, the authors noted that Congress has the exclusive power “to declare war, to raise and support armies, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;” as well as the duty to “guarantee to every state in the Union a republican form of government, and to protect each of them against invasion and against domestic violence.”<sup>248</sup> It follows, the authors argued, that the sovereign power of the United States includes the *obligation* to protect the states in cases of war, domestic violence, or invasion. Under this constitutional framework, it impossible to levy war against a single state without making the United States a party to that war:

Whenever a war is levied against the people of a state, the United States are of necessity a party to that war, and if they who levy war, owe allegiance to the United States, they are guilty of treason. . . .

If the rebels are traitors to a state, they are also traitors to the United States; and all the evil consequences of the crime affect the general government, and not merely the state sovereignty.<sup>249</sup>

Still, not all state treason laws are forbidden under this reasoning. The article argued that whether acts of treason against a state merged into treason against the United States depended on intent. If the intent were to *subvert* and *overthrow* the state government, overt acts in pursuit of such intent constituted treason against the United States because the federal government would be obligated to come to the state’s defense.<sup>250</sup> But if force were levied with the general intent of opposing the laws of the state but not overthrowing the state government, such acts would not implicate the federal government, and the crime would be treason against the state only.<sup>251</sup> Treason against a state might include violence aimed at intimidating the state government, controlling its operations, usurping its authority, or resisting its laws.<sup>252</sup>

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<sup>248</sup> *Id.* at 319.

<sup>249</sup> *Id.* at 319–20.

<sup>250</sup> *Id.* at 329.

<sup>251</sup> *Id.* at 331.

<sup>252</sup> *Id.* at 340, 347–48. Although never adopted by any court, some commentators found the reasoning in *American Law Magazine* persuasive. Chancellor Kent wrote that “levying war against one state is a levying of war against all in their federal capacity, and is a crime belonging exclusively to the federal government.” Then, citing the “able essay on this subject in *American Law Magazine*,” he concluded that “the limitation of treason against a state in its distinct capacity, would seem to be confined to cases in which the open and armed opposition to the laws is not accompanied with the intention of subverting the government.” KENT, *supra*

Although the debate over state treason never fully died, by the late nineteenth and early twentieth centuries, treatise writers generally agreed that states had the power to define and punish treason in all its forms. In his 1880 edition of *A Treatise On Criminal Law*, Francis Wharton reviewed the arguments for and against state treason.<sup>253</sup> After reviewing the opinions of learned treatise writers, the limited case law, and the practice of the states, Wharton concluded that state treason was a valid crime, a conclusion that was “practically beyond doubt.”<sup>254</sup> Other legal commentators in the same time period agreed that the weight of authority favored the view that states had the power to enact treason laws.<sup>255</sup>

Over the course of the twentieth century, opinions on the issue gradually disappeared. Although there was a spike in interest in treason laws following World War II, those cases largely dealt with treason against the United States and did not discuss whether the crime existed vis-à-vis the states. Treatise writers began giving less attention to the debate. Whereas the early editions of Wharton’s influential treatise on criminal law devoted approximately ten pages to state treason,<sup>256</sup> the most recent edition, published in 1996, reduces the issue to two short sentences: “Treason against a state may also be committed. The state treason statutes closely resemble the pertinent federal statute.”<sup>257</sup> Today, most criminal treatises and textbooks do not even mention state treason laws.<sup>258</sup>

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note 245, at 403 n.(a).

253 2 FRANCIS WHARTON, *A TREATISE ON CRIMINAL LAW* 551–55 (Philadelphia, Kay and Brother, 8th ed. 1880).

254 *Id.* at 554.

255 *See, e.g.*, 2 J. I. CLARK HARE, *AMERICAN CONSTITUTIONAL LAW* 1230 (Boston, Little, Brown, and Co. 1889) (noting that “the existence of a federal law rendering an offence criminal will not preclude the enactment of a similar statute by a State,” a principle that allows for state treason laws); 2 EMLIN McCLAIN, *A TREATISE ON THE CRIMINAL LAW* 535 (Chicago, Callaghan & Co. 1897) (“It is entirely possible that the same act may constitute treason against a state and also against the United States and be punishable as a crime by each, but no such question has ever been discussed in the courts of last resort.”); 2 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES* 1230–31 (Chicago, Callaghan & Co. 1910) (placing particular emphasis on *Lynch* and *Dorr* after reviewing the arguments regarding state treason, noting that those decisions “hold that there can be treason against a State of the Federal Union, and that open and armed opposition to the laws of the State, or a combination and forcible attempt to overturn or usurp the State government, giving aid and comfort to the enemies of a State or supplying them with provision”).

256 *See, e.g.*, FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 1001–10 (Philadelphia, Kay and Brother, 4th ed. 1857).

257 4 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 659 (15th ed. 1996).

258 *See, e.g.*, WAYNE R. LAFAVE, *CRIMINAL LAW* (5th ed. 2010) (no references to treason).

### C. *The Debate in State Legislatures*

Not surprisingly, the debate over state treason was not limited to legal commentators and treatise writers but spilled onto the floors of state legislatures as well. In 1868, for instance, legislators in South Carolina engaged in a heated and lengthy debate over whether the state constitution should contain a clause defining treason.<sup>259</sup> The draft constitution contained a treason clause, whereupon Mr. Mackey moved to strike it entirely, stating that “[i]t seems to me absurd to speak of treason against the State.”<sup>260</sup> He continued: “I regard it as impossible to commit treason against South Carolina. A citizen of this State can commit treason against the United States, but he never can be guilty of treason towards South Carolina or any other State. . . . I regard it just as impossible to commit treason against a State as to commit treason against a city or a county.”<sup>261</sup> In support of the motion to strike the definition of treason, another legislator noted that South Carolina was a “subordinate power,” and “there can be no treason against a subordinate power, but only against the supreme and sovereign power.”<sup>262</sup> Those in favor of a treason clause pointed to the practice of other states, as well as the Dorr and Brown examples.<sup>263</sup> In the end, those opposed to a constitutional definition of state treason carried the day. By a vote of eighty to twenty-six, the draft language was stricken.<sup>264</sup>

According to a commentator on Ohio law, the crime of treason was dropped from Ohio’s statutes in 1824: “. . . [I]t seems to have occurred to the general assembly, that treason against an individual state, under our federal union, was a mere chimera, against which it was useless to legislate.”<sup>265</sup> The commentator reasoned that “[i]t would be seizing the lion of federal sovereignty by the mane, and that too in his very lair; for the right to declare the punishment of treason is expressly delegated to Congress, by the federal constitution.”<sup>266</sup> Before too long, however, the Ohio legislature re-inserted

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259 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, HELD AT CHARLESTON, S.C., BEGINNING JANUARY 14TH AND ENDING MARCH 17TH, 1868, INCLUDING THE DEBATES AND PROCEEDINGS 326–38 (Charleston, Denny & Perry 1868).

260 *Id.* at 326.

261 *Id.*

262 *Id.* at 328.

263 *Id.* at 328 (noting that “in most of the States a similar provision is inserted in their Constitutions”); *id.* at 329, 333 (discussing the example of John Brown); *id.* at 334–35 (discussing example of Thomas Dorr).

264 *Id.* at 338.

265 *Acts of a General Nature, enacted, revised and ordered to be reprinted, at the first session of the twenty-second General Assembly of the State of Ohio, begun and held at the town of Columbus, December 1, 1823, and in the twenty-second year of said State*, THE AMERICAN QUARTERLY REVIEW, Sept. 1, 1831, at 29, 39.

266 *Id.*



treason into penal laws. During a debate regarding revision of the state constitution in 1851, one legislator questioned “the necessity of the provision in relation to ‘treason.’”<sup>267</sup> The reply came that, although it may never be needed, “if the section did no harm, why strike it out?”<sup>268</sup>

In 1854, a Maryland commission appointed to revise the state’s rules of practice reached a similar conclusion. Noting the division of opinions on whether treason can be committed against a state, the commissioners’ notes state that “the better opinion seems to be, that levying war against one State, is levying war against all, and is a crime belonging exclusively to the general government.”<sup>269</sup> Still, the Maryland law providing for punishment of the crime “will, in all probability, sleep quietly on the statute book hereafter, as it has done heretofore,” and “no great harm can be done, if [the definition of the crime] should not be strictly correct.”<sup>270</sup> This willingness to keep a treason law on the books regardless of its effectiveness or necessity runs through many states’ records. One commentator on Montana law, for example, noted that the State’s current treason law is “more historical than currently significant,” “seems pointless,” and “is of significant theoretical value but of little or no practical value.”<sup>271</sup>

#### IV. THE VALIDITY OF STATE TREASON LAWS TODAY

Although discussion over state treason has largely vanished from modern legal discourse, the issue remains relevant. Forty-three states have treason laws that, for the most part, have not changed since each state’s respective founding.<sup>272</sup> The United States Supreme Court has never specifi-

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267 CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 307 (Columbus, S. Medary 1851).

268 *Id.*

269 MARYLAND COMMISSIONERS TO REVISE, SIMPLIFY AND ABRIDGE THE RULES OF PRACTICE, PLEADINGS, FORMS OF CONVEYANCING, AND PROCEEDINGS OF THE COURTS OF THIS STATE, REPORT OF THE COMMISSIONERS TO REVISE, SIMPLIFY AND ABRIDGE THE RULES OF PRACTICE, PLEADINGS, FORMS OF CONVEYANCING, AND PROCEEDINGS, OF THE COURTS OF THIS STATE 170 (Cumberland, W. Weber 1854).

270 *Id.* Other states debated the validity of state treason during this time period. *See, e.g.*, 1 THE CONSTITUTIONAL CONVENTION OF MICHIGAN, THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN, CONVENEED AT THE CITY OF LANSING, WEDNESDAY, MAY 15TH, 1867, 346–47 (Lansing, John A Kerr & Co. 1867) (debating the motion to strike treason from state constitution, which failed); 5 THE CONSTITUTIONAL CONVENTION OF NEW YORK, REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, HELD IN 1867 AND 1868, IN THE CITY OF ALBANY 3618 (Albany, Weed, Parsons and Co. 1868) (debating a motion to strike reference to state treason in constitutional provision relating to the governor’s pardon power, which motion failed).

271 LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 82 (2001).

272 *Supra* notes 95–102 and accompanying text.

cally decided or discussed the validity of state treason laws.<sup>273</sup> Might state treason laws face constitutional challenge in the future, and if so, what is the correct outcome?

Because each state that criminalizes treason does so based on the two branches of treason contained in the Treason Clause, the analysis breaks into two separate questions: One, is it possible to commit treason by “levying war” against an individual state? And two, is it possible to commit treason by “adhering to the state’s enemies, giving them aid and comfort”?

#### A. “Levying War” Against a State

With respect to levying war against a state, the arguments against such a crime rest on simple and appealing logic: from the nature of the federal Union, levying war against one member of the Union is a crime against the whole. When disease strikes one internal organ, the entire body suffers; and in like manner, an overt act of treason against one state is a crime against them all. Because acts of war against one state threaten the cohesion and sovereignty of the United States, it follows that such acts ought to be punished under its laws and in its courts. If it were otherwise, as the prescient James Madison recognized, “the same act may be twice tried & punished by the different authorities.”<sup>274</sup>

Moreover, by demanding that the federal government intervene in hostilities against a state, the Guarantee Clause morphs acts of levying war against a state into treason against the entire Union. Article IV, Section 4 provides that the United States “shall guarantee to every State in this Union a Republican Form of Government,” and shall protect the states against invasion and, upon a state’s request, against domestic violence. The debates at the Constitutional Convention reveal the Framers’ intent that peaceful political processes would not trigger the President’s obligation under the Guarantee Clause; rather, the purpose was to protect the states against the kind of insurrection and rebellion that might overturn state governments and imperil the Union.<sup>275</sup> Reviewing this history, Professor Hurst concludes that “any effort by violence to deprive a state of a republican form of government would undoubtedly involve conduct amounting to a levying of war against the United States.”<sup>276</sup> Justice Story reached the same conclusion when he charged a jury that if the President called out troops

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273 *Ex parte Dorr*, 44 U.S. 103 (1845) (denying a writ of error on the grounds that the law of the state, under which he was prosecuted, was repugnant to the federal constitution).

274 *Supra* note 60 and accompanying text.

275 1 FARRAND, *supra* note 35, at 47–49. For a summary of the debate history and its ties to the Treason Clause, see *Treason II*, *supra* note 19, at 434–35.

276 *Treason II*, *supra* note 19, at 434 n.169.

to put down a rebellion against a state, “that would be a levy of war against the United States.”<sup>277</sup>

Notwithstanding the appeal of the above reasoning, the far better position is that individual states may constitutionally define and punish treason. This conclusion flows from the nature of state sovereignty in our federal system and bedrock principles of federal criminal jurisdiction. In short, those who have argued against state treason rest their positions on unduly grandiose conceptions of federal supremacy—conceptions that are not supported by the history or text of the Constitution.

Treason is a crime against sovereignty, and under the conventional English understanding, “sovereignty” referred to the indivisible, final, and unlimited power that rested with a single individual or entity: the King and, later, the King-in-Parliament.<sup>278</sup> But Americans had new and novel ideas about sovereignty. Americans held that sovereignty resided not in an indivisible person or entity, but in the People collectively.<sup>279</sup> Saying that the People are sovereign, however, merely begs the question: *which* People? Does sovereignty reside in the People of each state, or the People of the United States as whole? This question bears directly on the validity of state treason laws: If sovereignty lies in the People of each state, then state treason laws follow naturally; but if sovereignty resides in the People of the United States as a whole, state treason laws can rightly be seen as encroachments on federal authority.<sup>280</sup>

Not surprisingly, Americans have always disagreed over the wellspring of sovereignty. To the Anti-Federalists and Republicans of the founding generation, sovereignty resided in the People of each state.<sup>281</sup> To the Federalists, it resided in the People of the United States as a whole.<sup>282</sup> Yet sovereignty need not be a zero-sum game, and arguing strictly in favor of one is a choice of false alternatives. In the 1793 decision of *Chisholm v. Georgia*,<sup>283</sup> Chief Justice Jay posited that “the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the

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277 Charge to Grand Jury, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (Case No. 18,275).

278 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430–31 (1987).

279 *Id.* at 1435.

280 This latter position is precisely what some scholars in past generations used to argue against the validity of state treason laws. John Alexander Jameson, for example, after concluding that the United States is the “only real sovereign,” reasoned as follows: “Treason is a crime against sovereignty, a violation of one’s allegiance. Hence, there is really no such thing as treason against any political body in the Union but the United States.” JAMESON, *supra* note 244, at 55–56.

281 Amar, *supra* note 278, at 1452.

282 *Id.*

283 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

people of each State.”<sup>284</sup> Writing in the same case, Justice Iredell articulated what has since become a hornbook definition of American sovereignty:

Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved.<sup>285</sup>

Subsequent cases too numerous to list have repeated and applied this doctrine of dual sovereignty.<sup>286</sup> In the language of Madison, although the states surrendered some of their sovereign powers to the federal government, they retained “a residuary and inviolable sovereignty” as to all powers not surrendered.<sup>287</sup>

For our purposes, then, we need not resolve the full reach of state sovereignty, a hotly disputed topic that will always invite divided opinions.<sup>288</sup> We need only satisfy ourselves that, whatever else it entails, state sovereignty encompasses the power to define and punish treason by levying war. On this question, there is little doubt that the states retained such power.

First, as discussed above, the delegates to the Constitutional Convention debated this very question about state sovereignty in the context of treason, concluding that the federal Constitution would limit its definition of treason to the crime “against the United States.”<sup>289</sup> By simple application of the canon *expressio unius est exclusio alterius*, the text of the Treason Clause shows that states are free to define treason on their own.<sup>290</sup>

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<sup>284</sup> *Id.* at 471.

<sup>285</sup> *Id.* at 435.

<sup>286</sup> See, e.g., *Moore v. Illinois*, 55 U.S. 13, 20 (1852) (“Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either.”); *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (“It is incontestable that the Constitution established a system of ‘dual sovereignty.’ Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty.”) (citations omitted) (quoting another source).

<sup>287</sup> THE FEDERALIST No. 39 (James Madison) (Benjamin Fletcher Wright ed., 1961). Thus, in setting forth federal criminal jurisdiction, 18 U.S.C. § 3231 specifically states that “[n]othing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.” 18 U.S.C. § 3231 (2006).

<sup>288</sup> See, e.g., *Chisolm*, 2 U.S. at 456 (opinion of Wilson, J.) (“Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable.”).

<sup>289</sup> See *supra* notes 35–59 and accompanying text.

<sup>290</sup> Chief Justice Marshall confirms this reading of the Constitution: “The constitution recognizes the sovereignty of the States: *for it admits, that treason may be committed against them.*” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 327 (1821) (emphasis added).

Moreover, the doctrine of state sovereignty developed by the Supreme Court shows that states retained the power to define and punish treason. Like an archer's quiver, sovereignty includes many arrows, including the ability to make war, enter treaties, tax, provide for the common good, and so on. At the very core of sovereignty—the indispensable arrow, so to speak—is the right of the sovereign to demand allegiance of the governed. At its most basic level, as expressed by Chief Justice Jay, “Sovereignty is the right to govern . . . .”<sup>291</sup> Although the People of the states ceded some sovereign powers to the federal government, they did not cede the most basic right of the state to demand allegiance of its citizens. Because states demand allegiance, they necessarily possess the power to prohibit and punish the breach of allegiance.<sup>292</sup> This is precisely what the court in *Dorr* held when it reasoned that state sovereignty includes the right to self-protection, a sovereign right that includes enacting laws against treason by levying war.<sup>293</sup>

Although *Dorr* is the case most on-point, we need not stop there. In *Gitlow v. New York*,<sup>294</sup> the Supreme Court confirmed that a state, as an essential attribute of sovereignty, may proscribe and punish advocacy aimed at the violent overthrow of the state government by unlawful means.<sup>295</sup> In upholding New York's criminal anarchy statute, the Court held that a state may use its police powers to punish those who make utterances threatening the overthrow of the state government through violence.<sup>296</sup> To leave a state powerless to protect against subversion would “imperil its own existence as a constitutional State.”<sup>297</sup> “In short,” the Court said, “this freedom [of speech and assembly] does not deprive a State of the primary and

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291 *Chis olm*, 2 U.S. at 472 (opinion of Jay, C.J.). Allegiance is the price citizens pay for the state's corresponding obligation to provide protection. See, e.g., *Green's Case*, 8 Ct. Cl. 412, 417 (1872) (“This owing of allegiance, and this betraying, treachery, or breach of faith, in the case of resident aliens, is ascribed, it is believed, by every writer who is an authority upon the subject, to the reciprocal obligation of protection on the part of the government.”).

292 Treason, in its simplest terms, is the breach of allegiance owed to the sovereign. See *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 97 (1820) (“Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary.”); *United States v. Rahman*, 189 F.3d 88, 113 (2d Cir. 1999) (“[A]ny acceptable recitation of the elements of treason must include the breach of allegiance.”).

293 See 2 AMERICAN STATE TRIALS, *supra* note 122, at 1565; see also *State v. Raley*, 136 N.E.2d 295, 305 (Ohio Ct. App. 1954) (holding that the sovereignty of the states gives the states authority to enact laws that safeguard their sovereignty) *aff'd sub nom.* *State v. Morgan*, 133 N.E.2d 104 (Ohio 1956) *vacated sub nom.* *Raley v. Ohio*, 354 U.S. 929 (1957) and *vacated* *Morgan v. Ohio*, 354 U.S. 929 (1957) *aff'd per curiam on remand sub nom.* *State v. Morgan* 147 N.E.2d 847 (Ohio 1958) *aff'd in part, rev'd in part sub nom.* *Raley v. Ohio*, 360 U.S. 423 (1959).

294 *Gitlow v. New York*, 268 U.S. 652 (1925).

295 *Id.* at 667–68.

296 *Id.* at 667.

297 *Id.*

essential right of self preservation; which, so long as human governments endure, they cannot be denied.”<sup>298</sup>

*Gitlow*’s doctrinal core—that, the First Amendment notwithstanding, a state’s inherent right of self-preservation allows it to criminalize utterances aimed at the violent overthrow of the state government—was strengthened thirty years later by *Pennsylvania v. Nelson*.<sup>299</sup> There, the Supreme Court considered whether the 1948 iteration of the Smith Act,<sup>300</sup> a federal law that prohibits knowingly advocating the overthrow of the United States’ government by force or violence, preempted the Pennsylvania Sedition Act, a state law that proscribed the same conduct.<sup>301</sup> The Court held that in enacting the Smith Act, Congress intended to “occupy the field of sedition” against the United States, thereby preempting the Pennsylvania state law at issue.<sup>302</sup> But this did not mean that states lack power to guard against sedition. The problem in *Nelson* was that the state statute was not limited to sedition *against Pennsylvania*; rather, it also extended to sedition *against the United States*, and the facts before the Court related to acts aimed solely against the United States.<sup>303</sup> Although the Smith Act preempted the state statute, the Court went to great lengths to stress the narrowness of its holding. It stated:

It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct.

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<sup>298</sup> *Id.* at 668

<sup>299</sup> *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

<sup>300</sup> Smith Act of 1940, ch. 439, §§ 2 & 5, 54 Stat. 670, 671 (as amended ch. 645, Pub. L. No. 80–772, 62 Stat. 683, 808 (1948)) (current version codified as amended at 18 U.S.C. § 2385 (2012)).

<sup>301</sup> *Nelson*, 350 U.S. at 478–79. Regarding preemption, Congress may expressly preempt state law in federal legislation itself, or a federal court may decide that Congress has impliedly intended to preempt state law. See Robert A. Sedler, *The Constitution and the American Federal System*, 55 WAYNE L. REV. 1487, 1514–25 (2009) (providing examples of explicit preemption and implied preemption).

<sup>302</sup> *Nelson*, 350 U.S. at 504; see also *id.* at 509 (“Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania [holding that the state law was preempted] is unassailable.”).

<sup>303</sup> The Pennsylvania Supreme Court’s decision, which the Supreme Court affirmed in its entirety, stated it thus:

And, while the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania.

*Nelson*, 350 U.S. at 499.

... Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power . . . .<sup>304</sup>

Thus, Pennsylvania remained free to protect itself against sedition of all kinds. In subsequent cases, the Supreme Court made it unmistakably clear that *Nelson* did not prevent a state from enacting anti-sedition laws aimed at protecting the state itself.<sup>305</sup>

Although *Gitlow* and *Nelson* dealt with state sedition laws and not treason specifically, the same reasoning applies to treason statutes.<sup>306</sup> Treason and sedition are closely related; both are political offenses having the same central aim of the subverting the government. The main difference is that sedition is the advocacy of force or violence against the government, whereas treason consists of the actual overt acts of violence.<sup>307</sup> In our system of dual sovereigns, if states retained the power to protect against sedition—and *Gitlow*, *Nelson* and their progeny show that they did—then it follows that the states also retained the power to protect against subversive acts such as levying war against the state.

This conclusion requires us to refine our thinking about the meaning of “exclusive” federal criminal jurisdiction. In civil cases, state courts have concurrent jurisdiction over cases arising under the Constitution or a federal statute,<sup>308</sup> but federal criminal jurisdiction is different. Due to the prerogatives of the federal sovereign to prosecute violations of its own penal laws, the Judiciary Act of 1789 gave federal courts exclusive jurisdiction

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304 *Id.* at 500 (footnote omitted).

305 *See, e.g.*, *Uphaus v. Wyman*, 360 U.S. 72, 76 (1959) (“The basis of *Nelson* thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows a fortiori.”).

306 At least one court has interpreted *Nelson* as having broader applicability, including treason. *See Dombrowski v. Pfister*, 227 F. Supp. 556, 562 & n.7 (E.D. La. 1964) (construing *Nelson*, “[I]t would appear that the state may validly proceed with prosecutions of sedition, treason, subversive activities and communist activities, carried on within the State and directed at the State alone.”) (emphasis added) rev’d, 380 U.S. 479 (1965).

307 Sedition consists of “an agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority.” BLACK’S LAW DICTIONARY 1479 (9th ed. 2009). “The difference between sedition and treason is that the former is committed by preliminary steps, while the latter entails some overt act for carrying out the plan.” *Id.* The federal law of sedition is set forth in 18 U.S.C. § 2384 (2012) (seditious conspiracy) and 18 U.S.C. § 2385 (2012) (advocating overthrow of government).

308 *See, e.g.*, *Grubb v. Pub. Util. Comm’n*, 281 U.S. 470, 476 (1930) (noting that “state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts”) (citations omitted).

over federal crimes.<sup>309</sup> That pattern has held to today so that, absent congressional approval, state courts are not authorized to decide cases arising under federal criminal statutes.<sup>310</sup> *People v. Lynch*<sup>311</sup> and *Ex parte Quarrier*<sup>312</sup> both applied this basic framework and held that state courts lack jurisdiction to decide charges of treason *against the United States*. In our federal system, states exercise authority over all criminal matters *except* those that are granted to the federal government under the Constitution.<sup>313</sup>

Just as the United States has the prerogative to enforce its penal laws, individual states can enforce their own penal laws, so long as doing so does not interfere with the powers granted exclusively to the federal government. What happens, then, when criminal conduct falls within the area of overlap between federal and state power? This is the very problem, as noted earlier, that Madison struggled with during the debate over the Treason Clause.<sup>314</sup> The answer, developed through a series of decisions, is quite straightforward: both sovereigns can punish the crime.<sup>315</sup> “It is black-letter law that an act defined as a crime by both national and state sovereignties is ‘an offense against the peace and dignity of both and may be punished by each.’”<sup>316</sup>

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309 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

310 18 U.S.C. § 3231 (2012) (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.”).

311 *People v. Lynch*, 11 Johns. 549 (N.Y. Sup. Ct. 1814).

312 *Ex parte Quarrier*, 2 W. Va. 569 (1866).

313 For a review of the basic principles relating to federal–state jurisdiction, see Sedler, *supra* note 301. Regarding the basic allocation of power between the federal government and the states, Professor Sedler writes that “[t]he states exercise full sovereignty over domestic matters except to the extent that a particular exercise of such sovereignty is prohibited or restricted by the Constitution.” *Id.* at 1488.

314 See *supra* note 60 and accompanying text.

315 See *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (holding that one state’s prosecution did not preclude other states from prosecuting the same offense); *Abbate v. United States*, 359 U.S. 187, 194–96 (1959) (relying on *Lanza* to conclude that a state–court conviction will not prevent federal authorities from prosecuting a crime based on the same conduct); *Bartkus v. Illinois*, 359 U.S. 121, 136–37 (1959) (holding that federal–court action will not prevent state authorities from subsequent prosecution of the same conduct); *United States v. Lanza*, 260 U.S. 377, 382 (1922) (holding that two punishments for the same act did not violate the Double Jeopardy Clause of the Fifth Amendment because “[w]e have here two sovereignties, deriving power from different sources, capable of dealing with the same subject–matter within the same territory. . . . It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each”); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 33 (1820) (Johnson, J., concurring) (“Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States.”).

316 *United States v. Gerhard*, 615 F.3d 7, 25 (1st Cir. 2010) (quoting *Lanza*, 260 U.S. at



With respect to treason by levying war, then, this means that a single overt act could be treason against (1) the United States only, (2) the United States and a single state, or (3) against a single state only. The state court would have jurisdiction over (2) and (3), but not over treasonous acts that involved the United States only.<sup>317</sup>

With these principles of dual sovereignty and federal criminal jurisdiction in mind, the question whether levying war against one state constitutes treason against the entire Union is quite simple. Even if we accept the premise that levying war against one state is an offense to all or that the Guarantee Clause requires the federal government to come to the aid of a state in response to treason against the state, the state—a dual sovereign—would not lose its ability to punish the crime through its law and in its courts; although the federal government has jurisdiction to punish acts that violate its treason law, state authorities are not ousted from their domain.

### *B. Adhering to the State's Enemies, Giving Them Aid and Comfort*

With respect to state treason for “adhering to the enemies of the state,” different considerations arise. As demonstrated above, each state has the constitutional authority to proscribe treason. But that does not mean that the content of the law has no bounds, and as a matter of substantive treason law, there is a compelling case that treason against a state by adhering to the state’s enemies is impossible.

Like many aspects of American treason law, the phrase “adhering to their enemies” has its origins in English law. Under the Statute of 25 Edward III, treason reached those who were “adherent to the king’s enemies . . . [giving them] aid and comfort in the realm.”<sup>318</sup> The King’s “enemies” referred to foreign sovereigns, not domestic foes.<sup>319</sup> When the Framers bor-

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382); see also Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 87 (1996) (“In other words, if a distinct state interest is identified, the fact that the criminal act may also fall within the constitutionally ‘exclusive’ federal jurisdiction will not present a constitutional bar to state prosecution for the same act.”). Although the rule is firmly established, it still has detractors. See, e.g., PETER W. LOW AND JOSEPH L. HOFFMANN, *FEDERAL CRIMINAL LAW* 16–17 (1997) (noting the American Civil Liberties Union’s long opposition to the dual-sovereignty doctrine and providing examples). As a practical matter, any unfairness in application of the doctrine is mitigated by the fact that many states prohibit prosecution following a federal prosecution, and the United States also has a policy of not prosecuting following a state prosecution. See *id.* at 15–16.

317 See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 505 (3d ed. 1982).

318 4 BLACKSTONE, *supra* note 9, at 82.

319 See, e.g., EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 111 (London, W. Clarke and Sons 1809) (“[T]he subjects of the king, though they be in open war or rebellion against the king, yet are they not the king’s enemies, but traitors; for enemies be those that be out of the allegiance of the king. If a subject join with a foreign enemy, and come into England with him, he shall not be taken prisoner here and ransomed, or proceeded with

rowed the word “enemies” for use in the Treason Clause, they also imported its common-law meaning.<sup>320</sup>

The Civil-War era case of *United States v. Greathouse* demonstrates this point.<sup>321</sup> There, the United States indicted several individuals for “engaging in, and giving aid and comfort to, the existing rebellion against the government of the United States.”<sup>322</sup> The court held that domestic insurgents were not “enemies” within the meaning of the Treason Clause. In charging the jury, Chief Justice Field stated: “The term ‘enemies,’ . . . according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.”<sup>323</sup>

Thus, the “adhering to their enemies” branch of the Treason Clause examines the alleged enemy’s identity and allegiance, as well as the external state of affairs between the United States and the enemy’s homeland. The term “enemy” applies only to (1) subjects of a foreign power owing no allegiance to the United States, and (2) at a time when that foreign power is engaged in open hostilities against the United States. With respect to the second criteria, some courts and commentators have taken this concept further, stating that “enemies” only exist if the United States has formally declared war against the foreign power.<sup>324</sup> But the majority view—and the

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as an enemy shall, but he shall be taken as a traitor to the king.”) (modernized spelling); see also James Willard Hurst, *English Sources of the American Law of Treason*, 1945 WIS. L. REV. 315, 319–20 & 351 n.77 (1945) (examining English authorities who establish that that “adherence to enemies” applied to external enemies during wartime, not domestic controversies); Jabez W. Loane, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 61 (1965) (“Who is the ‘enemy’ for the purpose of receiving this aid and adherence? In the English cases, oriented as usual with monarchical concepts, it was the foreign sovereign himself.”).

320 See, e.g., *Charge to Grand Jury*, 30 F. Cas. 1039, 1039 (D. Mass. 1861) (“These terms, ‘levying war,’ ‘adhering to enemies,’ ‘giving them aid and comfort,’ were not new. They had been well known in English jurisprudence at least as far back as the reign of Edw. III. They had been frequently the subject of judicial exposition, and their meaning was to a great extent well settled.”).

321 *United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (No. 12,524).

322 *Id.* at 21.

323 *Id.* at 22; see also *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943) (German secret agent and spy operating in the United States was an “enemy” under the Treason Clause because “[h]e was the subject of a foreign power in a state of open hostility with us”); *United States v. Haupt*, 47 F.Supp. 836, 839 (N.D. Ill. 1942) (same), *rev’d on other grounds*, 136 F.2d 661 (7th Cir. 1943); *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919) (“On the breaking out of the war between the United States and the Imperial German Government, the subjects of the Emperor of Germany were enemies of the United States . . .”).

324 *Fricke*, 259 F. at 677 (“The class of treason with which we are dealing in this case only takes place, and only can take place, during war – when war is on”); George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2003–2004) (“According to a persuasive

better one—is that a formal declaration of war is not necessary.<sup>325</sup> Still, there must at least exist an armed conflict with a foreign power—what we might loosely refer to as a “state of war” or “time of war”—in order to create “enemies.”

The meaning of “enemies” presents an insurmountable challenge when applied to state treason laws. State treason laws largely track the substantive definition of treason contained in the Treason Clause, including the “adhering to [the state’s] enemies” language. To violate this branch of treason, the state itself must have “enemies” such that adhering to them is treason, which makes little sense because states cannot have “enemies” within the common-law meaning of the word. States cannot declare war or otherwise engage in armed hostilities with foreign powers. Article I, § 8 of the Constitution gives Congress the power to declare and conduct war.<sup>326</sup>

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line of cases, the concept of ‘enemy’ applies only in a declared war.”); *accord* 1 Op. Att’y Gen. 84 (1854) (“[T]here exists not only an actual maritime war between France and the United States, but a maritime war authorized by both nations. Consequently, France is our enemy; and to aid, assist, and abet that nation in her maritime warfare, will be treason in a citizen or other person within the United States not commissioned under France.”).

325 *See, e.g.*, Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1017–19 (2005) (arguing that a declared war is unnecessary and that foreign terrorists can be “enemies” within the meaning of the Treason Clause); Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635, 686–93 (2009) (reviewing cases and concluding that a formal declaration of war is not necessary); Loane, *supra* note 319, at 62 (“The offense of treason by aiding and abetting the enemy can only be committed during time of war. But it does not necessarily follow that the war must be attired with all the customary trimmings, such as a formal declaration.” The author concludes that “aiding the enemy could well be committed in an escalated ‘cold war’ situation.”); Francis S. Ruddy, *Permissible Dissent or Treason? The American Law of Treason: An Examination of the American Law of Treason, from Its English and Colonial Origins to the Present*, 4 CRIM. L. BULL. 145, 153 (1968) (reviewing authorities and concluding that “the law as it now stands would seem to regard opponents in an undeclared war, i.e. armed conflict with a foreign or government, ‘enemies’ within the meaning of the treason law”).

326 U.S. CONST. art. I, § 8; *see also, e.g.*, *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 287 (1876) (Bradley, J., dissenting) (noting that “a separate State cannot wage war: that is the prerogative of the general government”). Article I, § 10 of the Constitution outlines a narrow circumstance in which states can engage in war. It states that “[n]o state shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” U.S. CONST. art. I, § 10. However, as the text makes clear, the states’ ability to engage in war is strictly defensive and any defensive measures taken by states would be short-lived because the United States is constitutionally mandated to protect each state against invasion and provide for the common defense. *See* U.S. CONST. art IV, § 3; U.S. CONST. art. I, § 8; *see also* *Commonwealth v. Blodgett*, 53 Mass. 56, 82 (Mass. 1846) (“But the States are expressly prohibited from entering into any treaty, alliance or confederation, or, without the consent of congress, to enter into any agreement or compact with another State, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. They are, therefore, in the condition of States sovereign to some purposes, but who have by compact renounced and relinquished their sovereign powers, in regard to war and peace, and, of course, to the regulation and control of the incidents to war and peace, except the power of taking warlike measures, strictly and purely defensive, in case of an exigency, which will admit of

Article II, § 2 makes the President the Commander in Chief of the armed forces, including state militias, and gives the President the power over treaties and external affairs.<sup>327</sup> In the enduring language of Chief Justice Marshall, “In war, we are one people. In making peace, we are one people. . . . and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union.”<sup>328</sup> Thus, while the states retained the power to protect against seditious conduct of their own citizens, including the power to define and punish treason by levying war against the state, they did not retain the power to create “enemies” as that term has been developed historically and through case law.

This conclusion, of course, is not immune from critique. One could argue that when the United States engages in war with a foreign power, then that foreign power becomes an “enemy” to each state in the Union. But just as levying war against the United States is not war against each individual state,<sup>329</sup> war between the United States and a foreign power does make the foreign power an enemy to each state. The case of *People v. Lynch*—the only state case in which the “adhering to the state’s enemies” branch was at issue—illustrates this point. There, the court dismissed the indictment because it was *the United States*, not New York, that declared war against Great Britain, and therefore the British soldiers who had received food and supplies from the defendants were not enemies of the state.<sup>330</sup> Thus, *Lynch* implicitly holds that the United States’ enemies *ipso facto* are not enemies of each state as well.

One could also argue that while the term “enemies” under the Treason Clause requires a state of war against a foreign power, the states are free to define their own law of treason, and a state could define “enemies”

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no delay. In all other respects, the power of making war and peace, of treaties and alliances, is vested absolutely and exclusively in the general government, with their incidents. But as a compensation for this surrender, the general government of the United States is bound to protect each State against invasion, and against domestic violence.”). Given the narrowness of the exception, it does not alter the conclusion that individual states lack war-making power for purposes of the “adhering to the enemies” branch of treason.

327 U.S. CONST. art. II, § 2; *see also, e.g.*, *United States v. Pink*, 315 U.S. 203, 233 (1942) (noting that “power over external affairs is not shared by the States; it is vested in the national government exclusively”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (holding that “complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states”).

328 *Cohens v. Virginia*, 19 U.S. 264, 413–14 (1821).

329 *See Ex Parte Quarrier*, 2 W. Va. 569, 572 (1866) (holding that to “constitute treason against the State, it is not enough to wage war against the United States generally or collectively, or as component parts of the national Union, but it must be done directly against the State, in particular . . .”).

330 *See People v. Lynch*, 11 Johns. 549, 553 (N.Y. Sup. Ct. 1814).

to include domestic foes.<sup>331</sup> But this critique is lacking in at least two respects. First, it is a bedrock rule of statutory construction that identical words should be given the same meaning unless the legislature directs otherwise.<sup>332</sup> Although this rule usually applies when identical words appear within the same statute, in many instances, states borrow from the United States Constitution or federal statutes. In those cases, state courts look to the meaning of the words under federal authorities.<sup>333</sup> This is especially true when the words borrowed are technical terms whose meaning is rooted in a long history, as is the case with the language in the Treason Clause. In commenting on the term "levying war," for instance, Chief Justice Marshall wrote that because it is a technical term borrowed from English law, "[i]t is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it."<sup>334</sup>

Just as federal courts interpreting the Treason Clause have looked to English authorities for help with the meaning of the words borrowed from that country, state courts have done the same. The phrase "adhering to their enemies" has a long history, both in England and this country. To paraphrase Chief Justice Marshall, it is scarcely conceivable that the states used that phrase without intending to affix the meaning developed by those from whom it was borrowed.

Second, if a state's definition of "enemies" included domestic foes, treason under the "adhering to the state's enemies" branch would be superfluous. As the court in *Greathouse* explained, "[e]very act which, if performed with regard to a public and foreign enemy, would amount to 'an adhering to him, giving him aid and comfort,' will, with regard to a domestic rebellion, constitute levying war."<sup>335</sup> Under the facts of *Greathouse*, for example, even

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331 Indeed, at least one early state statute specifically included domestic enemies within the definition of treason. See Md. Act of March 6, 1861 (codified in Laws of the State of Maryland 251 (Thomas Wilson, ed. 1862)) (making it treason to "adhere to the enemies [of the state], whether foreign or domestic, giving them aid or comfort") (emphasis added).

332 See, e.g., *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (noting the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning") (citations omitted).

333 See, e.g., *Ghant v. Comm'r of Corr.*, 761 A.2d 740, 749 n.16 (Conn. 2000) (noting that "the due process provisions of the state and federal constitutions generally have the same meaning and impose similar constitutional limitations"); *Kahn v. Kahn*, 68 Cal. App. 3d 372, 384 (1977) (in discussing California's Code of Civil Procedure, noting that "[t]hese statutes are, in substance, exact counterparts of the federal rules. Therefore, the Legislature must have intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts.") (citations omitted) (quotation in original).

334 *United States v. Burr*, 25 F. Cas. 55, 159 (C.C.Va. 1807).

335 *United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (Case No. 12,524); see also *id.* at 23 ("[F]or every species of aid and comfort which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision—adhering to the enemies of the United States—would, if given to the rebels in the insurrection against

though Confederate soldiers were not “enemies,” and therefore those who aided the Confederacy could not be guilty of treason for adhering to an enemy, they could rightly be charged with treason by levying war against the government based on the same conduct.<sup>336</sup>

In sum, if an accused adhered to *domestic* foes, giving them aid and comfort through overt acts, such a person could likely be dealt with under a state’s “levying war” rubric. If an accused adhered to *foreign enemies*, giving them aid and comfort, such a person would fall within the reach of the Treason Clause and become subject to federal prosecution; and because the powers to make war and deal with foreign nations are exclusively federal powers, the state court would not have jurisdiction over such a case. In either scenario, a state law against “adhering to the state’s enemies” is unnecessary. The federal sovereign, of course, ought to maintain both branches of treason because it demands allegiance from its citizens and has the power to wage war against foreign powers. But it makes far less sense when applied to the states. Although states demand allegiance from their citizens—and therefore have the power to criminalize acts such as “levying war” by citizens against the state—they have no power to create enemies by waging war with foreign powers.

If treason by “adhering to the enemies of the state” is impossible, how do we explain the fact that forty-three states allow for criminal liability through this branch of treason? The answer may be that the first state treason statutes were drafted prior to the Constitution in an era when individual states had not fully ceded to the federal government the power to engage in war with foreign powers.<sup>337</sup> Under the Articles of Confederation, states waged war against Native American tribes, maintained standing armies, and even conducted negotiations with foreign powers.<sup>338</sup> The

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the government, constitute a levying of war under the first clause.”)

336 *Id.* at 29; see also *Ex parte Bollman*, 8 U.S. 75, 112 (1807) (“An adherence to rebels, is not an adherence to an enemy within the meaning of the constitution. Hence if the prisoners are guilty, it must be of levying war against the United States.”).

337 As discussed above, most of the original states had treason statutes prior to the Revolution of 1776. See *Treason I*, *supra* note 19, at 232. And all of the states except Georgia enacted state treason statutes while operating under the Articles of Confederation. See *supra* text accompanying note 26.

338 See, e.g., Amar, *supra* note 278, at 1447–48. The Articles of Confederation attempted to restrict the states’ powers with respect to war and foreign affairs. See ARTICLES OF CONFEDERATION art. VI, para. 1 (“No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State.”); *id.* at art. VI, para. 5 (“No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted.”). But states routinely ignored the authority of Congress and acted in their own interests with respect to war and foreign affairs. See, e.g., Richard E. Levy, *Federalism and Col-*

states, therefore, could create “enemies.” Nevertheless, after ratification of the Constitution, states continued to rely on the pre-Constitution statutes or enacted new laws that repeated the same language. As new states joined the Union, they in turn patterned their new constitutions after the federal Constitution, including the Treason Clause, as well as the existing state laws of other states. In short, current state laws are based more on history, tradition, and inertia, not any reasoned analysis of how the “adhering to the enemies” branch of treason operates at the state level.

#### CONCLUSION

This article has collected the key authorities, summarized the key cases, and analyzed the key issues relating to whether states can criminalize treason. With the evidence in, we can say confidently that states have the power to define and punish treason, but we have also learned that a reassessment of the substance and need for state treason laws is long overdue. State treason laws date to the founding of the Republic when state security played a much larger role. Their continued relevance, however, is questionable. State treason laws are like a rusty tool in the backyard shed: we have a vague sense that the tool was useful at some point, so we would rather not discard it; but for now, we cannot imagine why we need it or how it ought to be used.

This article raises several issues that could guide state policy makers as they reassess state treason laws. Although not an exhaustive list, policy makers ought to consider the following: First, is there a need for a law against treason? Today, seven states do not have laws defining treason against the state.<sup>339</sup> Does anybody really think that Hawaii, Maryland, New Hampshire, New York, Ohio, Pennsylvania, and Tennessee are more susceptible to subversion and attack than the states that criminalize treason? These seven states would not forego treason laws if such laws had any practical impact on states’ use of its police powers. Acknowledging that a treason law is obsolete, in other words, does not leave the state powerless against subversion. In light of the exhaustive codes of criminal conduct, it is difficult to think of an act that could be deemed “treason” that would not also

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*lective Action*, 45 U. KAN. L. REV. 1241, 1254 (1997). In fact, the need for the federal government to speak with one voice in foreign affairs was among the key drivers that led to the creation of the Constitution. *See, e.g.*, THE FEDERALIST NO. 42, 302 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“If we are to be one nation in any respect, it clearly ought to be in respect of other nations.”); *id.* at 303 (noting that the Articles of Confederation left the confederacy of states “in the power of any indiscreet [state] to embroil the Confederacy with foreign nations”).

<sup>339</sup> These states are Hawaii, Maryland, New Hampshire, New York, Ohio, Pennsylvania, and Tennessee.

fall within the definition of some other state crime.<sup>340</sup> Nonetheless, despite the dubious practical usefulness of state treason laws, it remains within the states' prerogative to criminalize treason. States may validly conclude that keeping a treason law on the books carries significant weight theoretically and symbolically. Such considerations may outweigh the desire to scrub obsolete laws from the statute books.

Second, is the substance of the treason law consistent with historical understandings and case law? The term "adhering to the enemies of the state," for instance, has a long common law history that should not be ignored. All forty-three states that maintain treason laws include treason by adhering to the enemies of the state. Yet hundreds of years of common law history and well-reasoned cases such as *United States v. Greathouse*<sup>341</sup> and *People v. Lynch*<sup>342</sup> show that individual states cannot have "enemies." Enemies are subjects of a foreign power at war with the United States, and because states lack the power to wage war or conduct foreign relations, they cannot create enemies. Thus, state policymakers ought to consider deleting this branch of treason from the statute books altogether. Alternatively, if it must remain, states should clearly define the word "enemies" in the statute, thereby giving notice of the conduct that violates the law. As it stands currently, the definition of that term makes no sense when applied in the state context.

Third, is the state's law consistent with the American policy of narrowly restricting the conduct that amounts to treason? The key lesson from the constitutional debate over the Treason Clause is that the Framers recognized the dangers of broad and indeterminate treason laws and took steps to restrict the crime. States, for example, should not include conspiracy within the definition of treason, as that expands the circle of punishable conduct. Vermont, the only state that continues to do so, should consider amending its law by deleting the references to conspiracy. The better practice, illustrated by Minnesota, is to specifically *exclude* conspiracy in the definition of the crime.<sup>343</sup>

Fourth, do state treason laws inappropriately encroach on the exclusive jurisdiction of federal courts? Due to the doctrine of dual sovereignty, "exclusive" federal jurisdiction does not mean that states lack the power to criminalize acts that also run afoul of federal criminal law, and vice versa.

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340 As the commentary to Alabama's treason statute states, "the classical definition of treason is broad enough to cover overt acts as they appear, and most if not all of the activities that one can conceive of as being directed against the state of Alabama are independently criminal under other provisions of the Criminal Code." ALA. CODE § 13A-11-2 (1975) (commentary). Although it has no treason law, New York has a criminal anarchy statute that prohibits advocacy to overthrow the existing form of government by violence. *See* N.Y. PENAL LAW § 240.15 (McKinney 2008).

341 *United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (Case No. 12,524).

342 *People v. Lynch*, 11 Johns. 549, 553 (N.Y. Sup. Ct. 1814).

343 MINN. STAT. ANN. § 609.385 (West 2009).



Still, as *Pennsylvania v. Nelson* and its progeny illustrate, although states may punish acts aimed at the state, the state law must not include acts against the United States, as such acts are preempted by federal law.<sup>344</sup> In this connection, one state—Louisiana—defines treason to include levying war “*against the United States*” and adhering to the enemies “*of the United States.*” Louisiana should consider amending its law and other states should avoid such language.

Finally, have legislative actions over the years resulted in inconsistencies and ambiguities in the state’s treason law? Most notable in this regard is the fact that twenty-one states define treason by constitutional provision but contain no corresponding penalty for the offense.<sup>345</sup> Many of these same states previously had statutes that imposed a penalty for treason but repealed those statutes without addressing the constitutional provisions.<sup>346</sup> The result is that we are left to guess whether the constitutional provisions are self-executing and enforceable or, as is more likely, non-self-executing nullities.<sup>347</sup> Inconsistencies also arise in the seven states that currently have no treason law. Although the legislatures in those states repealed the substantive offense, they failed to account for other provisions of state law that refer to or incorporate the crime.<sup>348</sup> Such provisions are meaningless and only clutter and confuse the states’ statutory laws.

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344 See *Pennsylvania v. Nelson*, 350 U.S. 497, 481 (1956).

345 See *supra* note 118 and accompanying text.

346 See, e.g., N.J. STAT. ANN. § 2A:148-1 (West 2011) (providing penalty upon proof of treason), *repealed by* Act of Aug. 10, 1978, 1978 N.J. Laws 687-88, effective Sept. 1, 1979.

347 See *Older v. Sup. Ct.*, 157 Cal. 770, 780 (1910).

348 See *infra* note 95 and accompanying text (all states except Hawaii, Maryland, New Hampshire, New York, Ohio, Pennsylvania, and Tennessee have laws defining treason against the state).